STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1756-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

ROMAN T. WISE,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

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INTRODUCTION

Wise claims that his convictions are multiplicitous on the theory that he committed only one act of fleeing police in violation of Wis. Stat. § 346.04(3), therefore he cannot be charged with separate crimes under Wis. Stat. § 346.17(3) for the separate harms he caused to four different victims as a result of that act. Ergo, he says, trial counsel was ineffective for failing to dismiss three of his charges on this ground.

But Wise's analysis is flawed. Under well-settled principles of statutory interpretation, the court of appeals correctly held that fleeing the police causing different harms are separate crimes with different elements and with their own individually defined felony classifications under Wis. Stat. § 346.17(3). Moreover, the charges here were all different in fact because they all named separate harms to different victims, so under long-standing case law from this Court, Wise could be appropriately charged and convicted of all four even if they were the same in law. And Wise pointed to nothing showing legislative intent that a person who causes harm to multiple victims during a single act of fleeing police should face only a single punishment—indeed, that would not be proportionate when a single act of fleeing harms multiple people.

The court of appeals' thoughtful and careful analysis on this issue is correct and sound, and trial counsel's failure to make a challenge that would have failed is neither deficient nor prejudicial. There is nothing here that needs this Court's clarification.

SUPPLEMENTAL STATEMENT OF THE FACTS

On December 17, 2017, police saw a Lexus that had been stolen earlier that day and attempted to pull it over. (R. 1:3.) The driver fled and led police on a brief high-speed

chase through Milwaukee. (R. 1:3.) The Lexus crashed into two other vehicles in an intersection, a Monte Carlo driven by CW and a Toyota Rav4 driven by CD. (R. 1:4.) Wise was arrested attempting to climb out the back-driver's window. (R. 1:3.) QLH, a teenaged girl, was found unconscious in the back of the car. (R. 1:3.) She was taken to a hospital and treated for numerous extremely severe injuries. (R. 1:3.) QRD, a teenaged boy, was also found unresponsive in the car. (R. 1:3.) He was taken to the hospital as well but died from his injuries. (R. 1:3.)

The State charged Wise with four counts of fleeing resulting in different harm to each victim: QRD's death, QLH's great bodily harm, damage to CW's Monte Carlo, and damage to CD's Rav4. (R. 4.) A jury found him guilty of all four charges. (R. 64.) The court sentenced him to 12 years of initial confinement and 8 years of extended supervision. (R. 80:1–2.)

Wise filed a motion to vacate his convictions on counts two through four, claiming they were multiplicitous with count one and therefore his trial counsel was ineffective for failing to move to dismiss them. (R. 91:2.) The circuit court found that Wise's charges were not the same in law or the same in fact and denied the motion without holding a *Machner*[1] hearing. (R. 100:5.)

The court of appeals affirmed in a unanimous decision recommended for publication. Wise petitioned this Court for review. The State opposes the petition.

ARGUMENT

The State does not dispute that this case involves both a federal constitutional issue and a question of statutory

[1] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

interpretation. But the court of appeals properly resolved both issues by simply applying long-standing law from this Court to the facts of the case. Wise's trial counsel cannot have been ineffective for failing to mount a meritless challenge to Wise's charges.

Accordingly, there is nothing novel here and nothing for this Court to clarify or develop, thus this case does not meet this Court's criteria for review.

A. The court of appeals properly held that three of Wise's charges were different in law because Wis. Stat. § 346.17(3) plainly adds elements to the base crime of fleeing an officer as defined in Wis. Stat. § 346.04(3).

Wise contends that Wis. Stat. § 346.04(3) alone defines the crime of fleeing an officer, and consequently all four of his convictions are the same in law because that statute describes only two elements to the offense: receiving a signal from a law enforcement officer and then attempting to flee or elude that officer. (Pet. 14–17.) But, as the court of appeals correctly recognized, Wise makes no attempt to reconcile that language with the language of the various subsections of Wis. Stat. § 346.17(3), which clearly add elements to the base crime of fleeing and designates fleeing causing different types of harm as different felonies with their own specific felony classification. (Pet. 14–32.)

Statutes are not interpreted in isolation, meaning Wise's argument focusing solely on the language of Wis. Stat. § 346.04(3) fails. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. The statutory scheme and plain language of Wis. Stat. §§ 346.04(3) and 346.17(3), properly read in conjunction, show that Wise's charges were different in law. Wise's charges for

counts one, two, and three, and counts one, two, and four,[2] each have an element that the others do not: the degree of harm caused by Wise's fleeing police. Accordingly, his convictions cannot amount to a double jeopardy violation even though they all arise from Wise's single act of crashing the SUV while fleeing.[3]

Wise claims that Wis. Stat. § 346.17(3) simply imposes penalty enhancers for escalating harms resulting from violating Wis. Stat. § 346.04(3) and that the only two elements for fleeing an officer are receiving a signal to stop and failing to do so. (Pet. 14–30.) He says this result is required by the jury instruction for fleeing. (Pet. 14–30.) The statutory language and long-standing case law plainly show that the court of appeals properly rejected this argument.

Wisconsin Stat. §§ 346.04 through 346.16 set forth rules for operating vehicles on Wisconsin roadways. Wisconsin Stat. § 346.04 mandates that people comply with official traffic signals and obey any lawful order, signal, or direction of a traffic officer. The State does not dispute that the simple

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[2] Counts three and four are the same in law because they both charged Wise with fleeing police causing property damage. However, as explained below, they were different in fact because each named a different victim.

[3] The State acknowledges that this analysis does not dispose of the legal relationship between counts three and four, Wise's two convictions for fleeing causing property damage to CW and CD by destroying their vehicles in the crash. (R. 6:2.) Those two charges are the same in law because they are both convictions for violations of Wis. Stat. §§ 346.04(3) and 346.17(3)(b), meaning they both have the following elements: (1) Wise operated a motor vehicle on a highway after receiving a visual or audible signal from a marked police officer; (2) Wise knowingly fled the officers by increasing the speed of the vehicle; and (3) Wise's operation of the vehicle to flee the officer caused property damage to a victim. The court of appeals properly held that these two charges are nevertheless different in fact from each other, however, and the State will discuss them in the next subsection.

act of fleeing, as defined in Wis. Stat. § 346.04(3), has two elements: (1) operating a vehicle on a highway after receiving a visual or audible signal from a law enforcement officer; and (2) knowingly fleeing from or attempting to elude the officer. There are no felony classifications or other criminal penalties described in Wis. Stat. § 346.04 itself, nor in any of the other rules of the road set forth in Wis. Stat. §§ 346.05 through 346.16.

Instead, criminal penalties for violating sections 346.04 through 346.16 are found in Wis. Stat. § 346.17. Subsection (3) addresses violations of Wis. Stat. § 346.04 and provides:

> (a) Except as provided in par. (b), (c), or (d), any person violating s. 346.04(3) is guilty of a Class I felony.
>
> (b) If the violation results in bodily harm, as defined in s. 939.22(4), to another, or causes damage to the property of another, as defined in s. 939.22(28), the person is guilty of a Class H felony.
>
> (c) If the violation results in great bodily harm, as defined in s. 939.22(14), to another, the person is guilty of a Class F felony.
>
> (d) If the violation results in the death of another, the person is guilty of a Class E felony.

Wis. Stat. § 346.17(3).

So, the simple act of fleeing by performing the two elements described in Wis. Stat. § 346.04(3) alone is itself a Class I felony pursuant to Wis. Stat. § 346.17(3)(a). Subsections (b) through (d) of Wis. Stat. § 346.17(3), however, then incorporate that baseline definition of fleeing articulated in Wis. Stat. § 346.04(3) and each add a third, distinct element of causing a particular type of harm, as defined in the criminal statutes, to that baseline definition to create a new crime. This is evident not only by the plain language of the subsections, but by the fact that subsections (b) through (d)

change the felony classification for fleeing depending on the additional element present. Wis. Stat. § 346.17(3)(b)–(d). This means each of these subsections defines a distinct crime that is different in law than the others, because they each have an element the others do not: the type of harm caused.

Further supporting this interpretation is the fact that there is no penalty designated in subsections (b) through (d) that can be added to the Class I felony penalty designated in subsection (a) for the act of fleeing causing no harm. One cannot "add" a separate Class H felony for fleeing causing bodily harm to the penalty for the Class I felony of fleeing causing no harm. Nor could multiple additional felony classifications for causing multiple deaths or injuries be added to the penalty for a Class I felony for a single conviction for violation of Wis. Stat. §§ 346.04 and 346.17(3)(a) causing no harm. Accordingly, Wis. Stat. § 346.17(3)(b)–(d) define stand-alone crimes rather than penalty enhancers. Wise's charges for counts one and two are legally different from each other and from counts three and four, and therefore he was charged with and convicted of three different substantive, stand-alone crimes.

The court of appeals reached a similar conclusion on nearly identical facts when discussing Wis. Stat. § 943.10 (1997–98), the burglary statute, in *State v. Beasley*, 2004 WI App 42, 271 Wis. 2d 469, 678 N.W.2d 600, which this Court has long endorsed. There, the court of appeals held that subsection (1) of the burglary statute first defined the basic crime of burglary as entering a place without consent of the lawful possessor and with intent to steal or commit a felony, and designated it a Class C felony. *Id.* ¶ 12 (citing Wis. Stat. § 943.10(1)). Subsection (2) then stated,

> Whoever violates sub. (1) under any of the following circumstances is guilty of a Class B felony:
>
> (a) While armed with a dangerous weapon or a device or container described under s. 941.26(4)(a); or

> (b) While unarmed, but arms himself with a dangerous weapon . . . while still in the burglarized enclosure; or
>
> (c) While in the burglarized enclosure opens, or attempts to open, any depository by use of an explosive; or
>
> (d) While in the burglarized enclosure commits a battery upon a person lawfully therein.

Wis. Stat. § 943.10(2) (1997–98).

The defendant, Shawn Beasley, participated in a home invasion and fatal shooting. *Beasley*, 271 Wis. 2d 469, ¶ 2. He was tried and found guilty of seven charges related to the incident, including one for burglary with intent to steal while armed with a dangerous weapon in violation of Wis. Stat. § 943.10(2)(a) (1997–98) and one for burglary with intent to steal while committing battery upon a person lawfully in the burglarized enclosure in violation of Wis. Stat. § 943.10(2)(d) (1997–98). *Id.* ¶ 3. Like Wise, Beasley contended that his two burglary convictions were multiplicitous, arguing that the "while armed" element of count five and the "battery" element of count six were not separate crimes but were rather penalty enhancers that enhanced the same underlying Class C felony, burglary, to a Class B felony. *Id.* ¶ 4.

The court of appeals disagreed, holding that while Beasley's argument had some superficial appeal, "[a] clear-eyed review of the statutes shows that the legislature did not fashion the subsections of § 943.10(2) as penalty enhancers." *Id.* ¶ 13. "Penalty enhancers, such as those defined in Chapter 939, authorize specified increases to separate specified penalties for underlying crimes." *Id.* ¶ 14. In other words, "the underlying crime has a penalty, and the enhancer adds an additional penalty." *Id.* "Because of this structure, when the facts support multiple penalty enhancers, multiple enhancers may normally be applied to the same underlying crime." *Id.*

But that was not the structure of Wis. Stat. § 943.10(2) (1997–98). *Id*. The language of the subsections of Wis. Stat. § 943.10(2) (1997–98) did not add an additional penalty to an underlying crime; they each defined a complete, stand-alone crime with its own Class B felony classification. *Id.* ¶ 15. "Further, unlike penalty enhancers, the various aggravating circumstances in the subsections of Wis. Stat. § 943.10(2) cannot be added to the underlying crime of burglary, either singly or in multiples." *Id.* ¶ 16.

That is nearly identical to the structure of the fleeing an officer statute at issue here, and therefore the court of appeals properly held that the *Beasley* analysis compelled the same result in this case. The subsections of Wis. Stat. § 346.17(3) define different, stand-alone crimes by adding elements to the crime of fleeing as defined by Wis. Stat. § 346.04(3), just as the subsections of Wis. Stat. § 943.10(2) (1997–98) defined different, stand-alone crimes one could commit as part of a burglary by adding elements to that offense.

Moreover, just like Wise, Beasley relied on the structure of the jury instructions and verdict forms to argue that burglary constituted the only crime and the various aggravating circumstances were penalty enhancers, and attempted to rely on the jury instructions to support his interpretation. (Pet. 21–30.) Like the instructions and verdicts at issue here, the jury verdict forms in *Beasley* informed the jury that it had to decide if Beasley was guilty of burglary, and if it answered yes, it then had to decide whether he committed that offense with a dangerous weapon (or committed a battery while he committed it for the other count). *Beasley*, 271 Wis. 2d 469, ¶ 17. The court of appeals held that the composition of the jury instructions was not germane to the statutory analysis and that Beasley's argument "really constitutes a challenge to the structure of

the jury instructions, not a challenge to the propriety of multiple convictions under the statutes." *Id.* ¶ 17.

The court of appeals further held that "[t]he result would be the same even if the form verdicts had given Beasley's jury the opportunity to find Beasley guilty of simple burglary alone," like Wise's verdict forms did here. *Id.* ¶ 19; (R. 64). This Court noted that "[i]n that situation, the verdict forms would have included two extra answers, but Beasley's jury still would have found the existence of all of the elements of the Class B felony defined in Wis. Stat. § 943.10(2)(a), and all of the elements of the separate Class B felony defined in § 943.10(2)(d)." *Beasley*, 271 Wis. 2d 469, ¶ 19. Wise's claim that the form of the jury verdicts or instructions means the Legislature did not define separate crimes in Wis. Stat. § 346.17 simply has no support in the law.

Wise acknowledges *Beasley* but utterly fails to address it. (Pet. 24–25.) *Beasley*, which this Court has never overruled or even called into question, indisputably controls disposition of this case and the court of appeals correctly applied it.

While it is true that the burglary statute at issue in *Beasley* defined the crime of simple burglary in Wis. Stat. § 943.10(1) (1997–98) and then defined the other possible crimes involving a burglary in Wis. Stat. § 943.10(2) (1997–98), that is not a material difference to the composition of Wis. Stat. §§ 346.04(3) and 346.17(3). The State does not dispute that the Legislature fully outlined the elements of the offense of fleeing causing no harm in Wis. Stat. § 346.04(3). As the statutory structure of all of Wis. Stat. § 346.04–.17 shows, however, the Legislature chose to establish the substantive rules of the road in Wis. Stat. §§ 346.04 through 346.16 and then assign them penalties, as well as define the other, more serious crimes that could be committed by violating them in a different statutory section, Wis. Stat. § 346.17. It then defined several different crimes of fleeing in Wis. Stat. § 346.17(3)(b)–(d).

Wise fails to explain why the fact that the Legislature's choosing to place these crimes in a separate statutory section means that the subsections of Wis. Stat. § 346.17(3)(b) through (d) don't incorporate the elements described in Wis. Stat. § 346.04(3) and then add new elements to the offense of fleeing causing no harm. Indeed, the Legislature frequently adds elements to a base crime to create a new crime in different statutory sections. The mere fact that criminal damage to property is defined in Wis. Stat. § 943.01 does not mean that none of the other ways of damaging property defined and criminalized in Wis. Stat. § 943.011–.017 are not separate crimes with different elements.

In short, the court of appeals properly interpreted Wis. Stat. § 346.17(3) in this Case. Review to simply affirm the court of appeals proper interpretation of this statute would be a waste of this Court's scarce resources.

B. The court of appeals properly held that all of Wise's charges were different in fact pursuant to this Court's holdings in *State v. Pal* and *State v. Rabe*, because each count named a different victim.

Even if there could be any real debate about whether the court of appeals properly interpreted Wis. Stat. § 346.17 here, there can be no dispute that the court of appeals properly held that each count on which Wise was charged were all different in fact because each named a different victim, and thus any multiplicity challenge would properly have been denied.

This Court has consistently held that "[i]n cases where the defendant commits one criminal act which has several victims," the different in fact test will always be met, "since the identity of the victim is an additional proof of fact in each case." *State v. Rabe*, 96 Wis. 2d 48, 67, 291 N.W.2d 809 (1980)

(citation omitted); *State v. Pal*, 2017 WI 44, ¶ 19, 374 Wis. 2d 759, 893 N.W.2d 848.

Accordingly, Wise's charges are all different in fact because to convict Wise on each the State had to prove that Wise harmed a different victim and prove the causal relationship between Wise's actions and the separate harm to each. *See Rabe*, 96 Wis. 2d at 66–67. For count one, the State had to prove that Wise's fleeing caused QRD's death; for count two, it had to prove that Wise's fleeing caused great bodily harm to QLH; for count three, it had to prove that Wise's fleeing caused damage to CW's property; and for count four, it had to prove that Wise's fleeing caused damage to CD's property. (R. 6.)

The fact that all of these harms arose as the result of a single act is immaterial. In *Pal*, and on facts indistinguishable from those here, this Court recently—and unanimously—reaffirmed that where a single act results in harm to several separate victims, charges for causing the harm to each separate victim are different in fact for a multiplicity analysis. *Pal*, 374 Wis. 2d 759, ¶ 22. There is no need for this Court to once again restate this longstanding principle of multiplicity law; it has been acknowledged for decades. *See Rabe*, 96 Wis. 2d at 66–67.

C. Wise did not show legislative intent to impose only a single punishment for fleeing police no matter how many victims were harmed in the process.

Finally, the court of appeals properly held that there was no due process concern with Wise's convictions because there is no evidence of legislative intent that only a single conviction can arise from an act of fleeing police regardless of the number of victims harmed.

"[L]egislative intent in multiplicity cases is discerned through study of" four sources. *Pal*, 374 Wis. 2d 759, ¶ 15.

First, "all applicable statutory language." *Id.* (citation omitted). Second, "the legislative history and context of the statutes." *Id.* Third, "the nature of the proscribed conduct." *Id.* And fourth, "the appropriateness of multiple punishments for the conduct." *Id.*

First, the applicable statutory language indicates that the Legislature authorized multiple punishments here. Wise contends that because the language of Wis. Stat. § 346.17(3)(b)–(d) speaks of "the violation" of Wis. Stat. § 346.04(3), singly, there cannot be multiple charges brought for harms caused by a single act of fleeing. But that language actually supports multiple charges from a single act of fleeing, rather than refutes it. The Legislature must have contemplated that a single "violation" of Wis. Stat. § 346.04(3) could give rise to multiple crimes, because it expressly predicated each separate crime in Wis. Stat. § 346.17(3) on the "results" of the act of fleeing. Wis. Stat. § 346.17(3)(b)–(d).

Indeed, subsection (a) states that "any person *violating* s. 346.04(3) is guilty of a Class I felony." Wis. Stat. § 346.17(3)(a) (emphasis added). But the next subsections use different language. Wisconsin Stat. § 346.17(b)–(d) each begin with "if the violation *results in*" a particular harm to another, the offender is guilty of a different felony. A single violation of Wis. Stat. § 346.04(3) can result in multiple harms to multiple victims. The fact that the Legislature chose to predicate the different crimes listed in Wis. Stat. § 346.17(3)(b)–(d) on the result of violating Wis. Stat. § 346.04(3) instead of on the fact of the violation itself shows that the Legislature intended separate charges for each harm resulting from a single violation of Wis. Stat. § 346.04(3).

Moreover, as this Court observed in *Pal*, "multiple victim accidents are not so rare that we can say the legislature did not take them into consideration when drafting the statute. Had the legislature intended that only one penalty could be imposed per accident, it could have more clearly done

so." *Pal*, 374 Wis. 2d 759, ¶ 25 (citation omitted). Multiple victim accidents arising from a dangerous activity like fleeing the police—which often involves high speeds, running traffic signals, sudden turns, and general reckless driving—are even more foreseeable than from other types of road violations, so the fact that the Legislature did not clearly state that only one conviction could be imposed per accident resulting from fleeing is instructive. *Cf.* Wis. Stat. § 346.63(1)(c) (stating that a person may be prosecuted for any combination of offenses in Wis. Stat. § 346.63(1)(a), (am), or (b) arising from a single incident, but only one conviction may be entered if the person is found guilty); *see also* Wis. Stat. §§ 939.71, 939.72 (expressly prohibiting subsequent prosecution for the same act under a different statutory subsection after acquittal or conviction and prohibiting conviction for both an inchoate offense and the completed offense which was the objective of the inchoate offense). The Legislature plainly knows how to indicate that only one conviction can arise from a single offense, and it did not do so regarding the fleeing statute.

Second, as to the legislative history and context of the statute, the drafter's note on which Wise relies again supports the imposition of multiple penalties rather than refutes it. (Pet. 38.) The drafter's note says that the intent was to "[m]ake [the] penalties [for fleeing] similar to those for OWI [i.e., higher penalties where OWI results in injury or death]" (R. 97:2) (last set of brackets in original); (Pet. 38). Wise claims this means the Legislature "did not intend to provide for multiple punishments based on multiple injuries, but graduated punishment based on the severity of the injuries." (Pet. 38.) As the court of appeals recognized, the problem with this argument is that in 1985 when Wis. Stat. § 346.17 was being drafted, this Court in *Rabe* had already held that the Legislature *did* intend multiple punishments for multiple injuries arising from an OWI offense. *See Rabe*, 96 Wis. 2d at 69–70. The Legislature is presumed to know the law when

enacting legislation. *Spence v. Cooke*, 222 Wis. 2d 530, 537, 587 N.W.2d 904 (Ct. App. 1998). If the Legislature did not intend for the fleeing statute to be interpreted the same way the OWI statutes were, it presumably would have said so instead of seeking to give the two similar treatment.

Turning to the third and fourth factors, the nature of the proscribed conduct and the appropriateness of allowing multiple punishments both also support imposing multiple punishments for multiple harms arising from a single incident of fleeing. Wise is incorrect that "the gravamen of the offense is the knowing flight from . . . the officer." (Pet. 38.) The gravamen of the offenses for which Wise was convicted is causing harm to people while knowingly fleeing. Because many, many people can be harmed by a single act of fleeing, including innocent people merely going about their day, it makes sense to impose multiple punishments for the damage caused to each, just as it makes sense to impose multiple punishments when an OWI offender harms multiple victims.

Wise's analysis allowing only one charge to be brought for fleeing no matter how many people were harmed in the incident would unduly depreciate the severity of the harm caused. Under Wise's theory, if he had driven down the sidewalk and killed 10 people while fleeing, he could only be charged with one crime of fleeing causing death to another. So, he would face no repercussions for killing nine other people, and their families, who are also victims, would be left with no justice. "[V]ictims' rights play an important role within our criminal justice system," *State v. Bokenyi*, 2014 WI 61, ¶ 63, 355 Wis. 2d 28, 848 N.W.2d 759, and the fact that Wise's interpretation of the statute would potentially leave many victims unaccounted for and unremunerated for their losses shows that multiple punishments are appropriate for causing harm to multiple people while fleeing police.

In short, all of the factors a court uses to discern legislative intent in a multiplicity analysis favor imposing

multiple punishments here. Accordingly, the court of appeals properly held that Wise's multiplicity claim must fail.

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Given the above, there is nothing here that warrants this Court's review. The court of appeals properly resolved this case by applying this Court's well-settled precedents on both statutory interpretation and multiplicity. This Court should deny Wise's petition for review.

Dated this 25th day of January 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 4,538 words.

Dated this 25th day of January 2022.

LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 25th day of January 2022.

LISA E.F. KUMFER
Assistant Attorney General