# The Wisconsin Court of Appeals District II

20AP1981-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Sergio Moises Ochoa
Defendant-Appellant

Appeal from The Circuit Court of Sheboygan County
The Honorable Rebecca L. Persick, presiding

# Brief of Appellant Sergio Moises Ochoa

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## Statement of the Issues

Mr. Ochoa presents three issues for this court to consider. Did the circuit court deprive Mr. Ochoa of his constitutional right to present a defense, did the circuit court abuse its discretion when it refused to allow Mr. Ochoa to testify regarding a non-hearsay statement, and did the jury instructions given by the circuit court accurately state the law of self defense.

This court should find the circuit court: deprived Mr. Ochoa of his constitutional right to present evidence in his defense, abused its discretion as it failed to accurately interpret the law regarding non-hearsay statements, and failed to accurately instruct the jury on the law central to the case.

## Statement on Oral Argument and Publication

Mr. Ochoa takes no position as to whether this case merits oral argument. Should this court request it, Mr. Ochoa welcomes the opportunity to further discuss his case with this court.

Mr. Ochoa requests publication. Any reversal of this magnitude warrants publication. Further, this case presents the opportunity to summarize multiple areas of law, and would be the first published case to address the constitutional right to present expert witnesses after the adoption of the *Daubert* standard for expert witnesses.

## Statement of Facts

Sergio Ochoa was born in Los Angles California. (R.494:4). When he was one, his parents moved back to Guadalajara in Mexico. (R.494:4). In Mexico, his family ran a beef and dairy farm. (R.494:4-5). Sergio's extended family began teaching him about firearms as a young teenager; they would practice shooting every week. (R. 494:6). Sergio would continue his firearms training and practice as an adult, joining shooting clubs and

learning about self-defense. (R.494:13-16). Sergio would go on to become a licensed concealed carry owner, practicing shooting no less than once a week, and began to pass his family's traditions of responsible firearm ownership to his children. (R. 494:36-44). Sergio would go on to become a licensed concealed carry owner, practicing shooting no less than once a week, and began to pass his family's traditions of responsible firearm ownership to his children. (R. 494:36-44).

On most weekends growing up, Sergio would go to rodeos with his family. (R.494:7). Most of the time, Sergio would see his cousin L.G. and L.G.'s. friend F.L.. (R.494:7-8). At the time, Sergio and L.G. were not particularly close. (R. 494:7-8). At the rodeo's and other community events, Sergio witnessed L.G. and F.L. engage in "pre-emptive, violent and brutal attacks" after a night of drinking. (R. 108:2). L.G. and F.L. would use unconventional weapons such as rocks and beer bottles as well as using an electrical wire used to shock bulls on one occasion. (R.108:2).

When he was 18, Sergio moved back to California with his friend Alex. (R.494:9). When Sergio and Alex arrived in the United States, L.G. picked them up at the airport. (R. 494:9). L.G. was the only person Sergio knew in California. (R.494:10). L.G. took Sergio in to hi s home, and helped Sergio get a job. (R.494:10). Over the next two years, Sergio and L.G. became even closer than cousins; they were each others' best friends, living together working together, and socializing together. (R.494:9-11).

After Sergio met his first wife, they moved back to Mexico. (R.494:11-12). In Mexico, Sergio continued to practice shooting, and took various classes at the shooting clubs where he was a member. (R.494:12-14). In these classes, Sergio received

training in a number of aspects of self-defense. (R.494:14-16). Eventually, Sergio and his wife divorced, and Sergio remarried. (R.494:17).

Mr. and Mrs. Ochoa moved back to the United States, first living in Arizona and Texas before settling in Oostburg, Wisconsin. (R.494:17-18). Mr. Ochoa had visited L.G. in Oostburg, and fell in love with the town as it was a nice community to work and raise a family. (R. 494:18). While Mr. and Ms. Ochoa were looking for their own apartment, they stayed with L.G.. (R. 494:18-19). Over the years, Mr. Ochoa and L.G. remained very close raising their families together in Oostburg; however, by the spring of 2017 L.G. had moved to Milwaukee for work and Sergio was working approximately 55 hours per week, causing them to see each other less often. (R. 494:19-30). Nonetheless, Mr. Ochoa continued to drive L.G.'s daughter to school daily throughout the 2016-2017 school year to help L.G.'s family and because their daughters were close in age. (R. 494:19-30).

As L.G. was Sergio's closest male relative living in the United States, L.G. was Mr. Ochoa's son's godfather, and Mr. Ochoa had invited L.G. to continue to be his son's godfather at his First Communion. (R. 494:32). In February of 2017, Mr. Ochoa saw L.G. ingest a powdery white substance in Mr. Ochoa's home. (R. 74:3). Mr. Ochoa believed the substance to be cocaine, and told L.G. to leave his house because he did not want drugs around his children. (R.74:3; R.494:32). After this incident, Mr. Ochoa decided L.G. would not be a good godfather to his son, and made arrangements for his father to take L.G.'s place. (R.494:33). *

In July of 2017, Mr. Ochoa's sister and her family visited Mr. Ochoa's family. (R.494:64). It was their first time visiting from Mexico despite Mr. Ochoa living in the United States for

over a decade, and Mr. Ochoa was ecstatic to have his sister, brother-in-law and nieces and nephews visit. (R.494:64-65). On Saturday, July 29, Mr. Ochoa finished working around 2 p.m. and was excited to return home to share a meal with his extended family. (R. 494:67-68). After an early supper, Mr. Ochoa caught up with his sister, and they called their parents in Mexico. (R.494:70-72).

Around 10:30, Mr. Ochoa and his bother-in-law went to L.G.'s home to bring over L.G.'s inhaler as well as beer and rum. (R.494:77-78). A few minutes after Mr. Ochoa arrived, L.G. returned home with F.L.. (R. 494:85). Mr. Ochoa noticed L.G. seemed to be under the influence of alcohol. (R. 494:86).

L.G. was happy and excited to see Mr. Ochoa. (R.494:85). L.G. asked Mr. Ochoa to accompany him to a back bedroom, where L.G. began to inhale lines of cocaine. (R.494:88). L.G. told Mr. Ochoa to come back later that night to discuss something important. (R. 368:2). Mr. Ochoa told L.G. he could not because of his plans with his family. (R. 368:2). L.G. was adamant insisting Mr. Ochoa return as L.G. was working in Milwaukee and did not know when he would return to Oostburg. (R.368:2-3). Mr. Ochoa and his brother-in-law then drove home. (R.494:90).

Mr. Ochoa had never seen his cousin make such a serious request. (R.497:33-34). When he woke up in the middle of the night, his cousin's request kept him from going back to bed. (R. 497:34). Mr. Ochoa got dressed and got ready to drive to his cousin's house. (R.497:34-35). Due to a number of robberies in the Oostburg area and the relatively late time of night, Mr. Ochoa lawfully carried his pistol with him. (R.497:36).

When Mr. Ochoa entered his cousin's home, he saw L.G. snorting something, and F.L. "cleaning" or pinching his nose. (R.497:38-39). As Mr. Ochoa and L.G. talked, L.G. became more

aggressive. (R.497:40). L.G. demanded to know "why the fuck [he] hadn't gone to visit him before and why the fuck [he] hadn't gone looking for him before" since L.G. had moved to Milwaukee. (R.497:41). Then L.G. demanded Mr. Ochoa explain "why the fuck [Mr. Ochoa] had decided not to have him be the godfather for [Mr. Ochoa's] son at his First Communion". (R. 497:42).

When Mr. Ochoa told L.G. the reason he had revoked his cousin's role as Sergio Jr.'s godfather was because of L.G.'s life choices and drug use, L.G. "exploded like a bomb". (R.497:42). L.G. began to exchange glances with F.L. who was opening and closing his pocketknife. (R.497:43). L.G. started to yell at Mr. Ochoa and F.L. kept yelling "you are so screwed"[1] at Mr. Ochoa. (R.497:44). Mr. Ochoa believed F.L. was treating Mr. Ochoa, threatening to kill him. (R.497:45). Mr. Ochoa tried walking around the home and deescalating the situation. (R.497:46-47). Mr. Ochoa tried to leave through the kitchen door, but couldn't turn the door knob. (R.497:50). L.G. came behind Mr. Ochoa with a knife in his hand, and yelled "where are you going". (R.497:50).

Mr. Ochoa was able to retreat to the living room. (R.497:54). F.L. loudly yelled "you're done", lifted his shirt and reached toward his waist. (R.497:57). Thinking F.L was about to draw a weapon, Mr. Ochoa drew his weapon and fired three times. (R. 497:57-8). L.G. then charged at Mr. Ochoa and lunged at Mr. Ochoa; Mr. Ochoa rotated his body and shot L.G. three or four times. (R. 497:59).

Mr. Ochoa left the residence, and intended to go directly to the Sheboygan police station. (R.497:66). He mistakenly thought the court house was the police station, and first drove there. (R.

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[1] An alternative translation of F.L.'s commentary is "you're gonna get fucked up", or "you're fucked now". (R. 85:4-5).

497:66). After realizing the court house was not the police station, Mr. Ochoa corrected his course and drove to the police department. (R.497:75-76). Mr. Ochoa pressed the intercom at the police station and wanted to explain who he was and what happened but was promptly arrested. (R.497:77-82).

L.G.'s son and two of his friends had been upstairs when the shooting occurred. (R.484:267). According to the son, the shooting occurred at 3:03 a.m. (R.484:272). At approximately 3:30 a.m., Sheboygan county dispatch received a 911 call indicating two individuals had been shot. (R. 481:226-289).

Deputy Chad Bauman, who had an intern riding along with him, was dispatched to the scene of the shooting, and was the first member of law enforcement to arrive. (R.482:15-17). Deputy Baumann made contact with a witness J.G. and subsequently entered the house. (R.482:24). Another witness with the initials J.G. was also in the house. (R.482:55). Both entered the residence with Deputy Baumann. (R.482:25). Shortly thereafter, a third individual used the back entry to enter the scene. (R. 482:40).

The Sheboygan County Sheriff's Department did not have a standard operating procedure for searching a shooting scene; officers were trying to figure out how to investigate the scene as they were investigating the scene. (R. 487:165). Likewise, the department lacked a standard operating procedure detailing how to move a body. (R. 486:295). Deputy Krogstad could not remember how many times L.G.'s body had been moved before it was removed from the scene. (R.486:296-96). Deputy Krogstad failed to report he or anyone else moved the body, despite doing so. (R.486:296-97). Deputy Krogstad failed to photograph how the body was initially found. (R.486:297). Deputy Weber testified officers found drug paraphernalia, but he and Captain

Norlander "determined" it was not a factor and so they did not collect the paraphernalia as evidence. (R. 487:191). When an expert was asked to reconstruct the crime scene, he determined it would be impossible due to the possible contamination problems, the lack of logical progression of officers search, and the improper documentation of stains, and bullet holes. (R.487:70). The State did not present an expert witness who attempted to provide a reconstruction of the scene; a State Trooper provided 3-D imaging of the scene after the witnesses had moved about the scene and law enforcement had already moved the bodies, altering the scene.

## Procedural History

Mr. Ochoa was arrested when he presented himself at the police department. A criminal complaint charging him with two counts of First Degree Intentional Homicide was filed on August 8, 2017. (R. 4:1). A preliminary hearing was held on August 28, 2017. The circuit court found there was probable cause, and Mr. Ochoa was bound over. (R. 458:58).

Mr. Ochoa gave notice of nine expert witnesses it expected to testify. (R. 84:1-3) Three of the witnesses were also named by the state. (R. 84:1). One witness was employed by the state of Wisconsin Laboratory of Hygiene. (R.84:1). The State raised relevancy and *Daubert* challenges to the other six defense experts. (R.100:1-10; R.147:1-7). After conducting two days of *Daubert* hearings, the circuit court determined it would not let Mr. Marty Hayes, Mr. Alfonso Villaseñor, or Mr. Conrad Zvara testify. (R.477: 34-35, 38).

Mr. Ochoa also sought to introduce *McMorris* evidence. (R.107; R.108:1-3). The circuit court determined it would not allow the *McMorris* evidence to be presented. (R.477:24-30).

The case proceeded to trial, and Mr. Ochoa was acquitted of both counts of First Degree Intentional Homicide and Second Degree Intentional Homicide, but was convicted of two lesser included counts of First Degree Reckless Homicide.convicted of two counts of first degree reckless homicide. (R.394:1; R.395:1). Mr. Ochoa was sentenced on March 13, 2020. On each count, the circuit court imposed 12.5 years incarceration and five years of extended supervision to be served consecutively. (R.435:1). Mr. Ochoa filed a timely notice of appeal on March 20, 2020. (R. 442:1-2). A timely notice of appeal was filed on November 24, 2020. (R.452:1)

## Argument

Mr. Ochoa has never denied he caused the death of his cousin L.G. and his friend F.L. The only factual dispute at trial was if Mr. Ochoa acted in self-defense, and if he did, was his belief reasonable. The circuit court's rulings prevented Mr. Ochoa from pursuing his defense, as the circuit court would not permit him to testify about the violent acts he had witnessed F.L. and L.G. commit which informed his beliefs regarding the threat they posed and the necessity of using deadly force to, would not allow Mr. Ochao to testify as to what L.G. told him which caused Mr. Ochoa to return to L.G.'s residence in the early morning hours, as well as presenting expert testimony to inform the jury of the most accurate interpretations of the slang threats F.L. was yelling which caused Mr. Ochoa to believe he was in great physical danger. The circuit court further refused to allow Mr. Ochoa to present experts in his defense which would inform the jury on both the principles and dynamics of using deadly force in violent or potentially violent so a jury would not misunderstand those principle and dynamics when determining the reasonableness of Mr. Ochoa's beliefs and actions. Lastly, when the circuit court was asked to fully instruct the jury on the statutory definition of self-defense, the circuit court refused to abide by the legislature's will, and established case law, and chose to instruct the jury on the law as to the central issue in the case, self-defense, which omitted the statutory definition of the actor's reasonable belief.

## I. There Are Few Rights More Fundamental Than the Right of an Accused to Present Evidence in Their Own Defense. When the Circuit Court Precluded Mr. Ochoa From Presenting *McMorris* Evidence, Expert Witness, and Non-Hearsay Testimony, the Circuit Court Violated Mr. Ochoa's Constitutional Rights.

### A. Legal Overview and Standard of Review

The fundamental right to present evidence is grounded in the confrontation and compulsory process clauses of Article I, Section 7 of the Wisconsin Constitution[2] and the Sixth Amendment of the United States Constitution[3]. *See State v. Pulizzano,* 155 Wis. 2d 633, 645-647, 456 N.W.2d 325 (1990); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967); *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965). These two clauses are the opposing side of the same coin; together they grant defendants a constitutional right to present evidence. *State v. Pulizzano*, 155 Wis. 2d at 645. Like many constitutional rights, the right to present evidence is not absolute; a defendant is only guaranteed the right to present relevant evidence which is not substantially outweighed by its prejudicial effect. *Pulizzano* at 646. Whether a defendant has been deprived of a fundamental constitutional right is a question of constitutional fact which appellate courts determine independently of the lower courts. *State v. St. George*, 2002 WI 50 ¶16, 252 Wis. 2d 499, 643 N.W.2d 777 (2002).

In *McMorris v. State*, the Supreme Court of Wisconsin held when there is a sufficient factual basis to raise the issue of self-

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[2] "In all criminal prosecutions the assumed shall enjoy the right...to meet the witnesses face to face; [and] to have compulsory process to compel the attendance of witnesses in his behalf".

[3] "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor..."

defense, the defendants personal knowledge of the victims prior violent character and acts is admissible. *McMorris v. State*, 58 Wis. 2d 144, 150, 205 N.W.2d 559 (1973). *McMorris* evidence is effectively other-acts evidence. The Supreme Court of Wisconsin has established a five part test for demonstrating a defendant has the constitutional right to present other acts evidence. The defendant must show:

1. The prior acts clearly occurred;
2. The acts closely resembled those of the present case;
3. The prior act is clearly relevant to a material issue;
4. The evidence is necessary to the defendant's case;
5. The probative value of the evidence outweighs its prejudicial effect

*Pulizzano*, 155 Wis. 2d at 651.

Likewise, our Supreme Court has established a four part test to determine if a defendant has the constitutional right to present an expert's testimony. The defendant must show:

1. The testimony of the expert witness met the standards of Wis. Stat. §907.02 governing the admission of expert testimony;
2. The experts witness's testimony was clearly relevant to a material issue in this case;
3. The expert witness's testimony was necessary to the defendant's case;
4. The probative value of the testimony outweighs its prejudicial effect.

*State v. St. George*, 2002 WI 50 ¶54

When there is a state evidentiary rule which would exclude the evidence at question, strict scrutiny is applied. *Pulizzano* at

28.[4] When a defendant has been denied their constitutional right to present evidence necessary to their defense, the harmless error rule is inapplicable. *Pulizzano* at 655-656; *see also State v. St. George*, 2002 WI ¶¶69-73 (The constitutional right to present a defense is a two part inquiry; was the proffered evidence and admissible, and if so is the right outweighed by any compelling state interest. Harmless error is not considered.).

B. The Circuit Court's Refusal To Allow Mr. Ochoa to Present *McMorris* Evidence Deprived Him of his Constitutional Right To Present a Defense

*McMorris* evidence is essentially other-acts evidence which is offered against the victim to allow the jury to evaluate the reasonableness of the defendant's beliefs the aggressor posed a threat of death or great bodily harm to his person, and the defendant's need to use force to terminate the unlawful interference against him. Both categories of evidence seek to admit prior wrong doings for a limited, permissible purpose. ("[P]roof should be admitted as to both the reputation of the

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[4] After *Pulizzano* was decided the United States Supreme Court has stated state and federal rule-makers have broad latitude in establishing rules excluding evidence in criminal trial, and a defendant's rights are abridged by rules which infringe upon the weighty interest of the accused, and are arbitrary or disproportionate. *United States v. Scheffer*, 523 U.S. 303, 308 (1998), *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). The multi-factor tests endorsed by the Wisconsin Supreme Court are not in conflict with the most recent writings of the United States Supreme Court; they are simply the test our State Supreme Court has adopted to determine if the defendant has a weighty interest, and if the rule excluding the evidence is arbitrary or disproportionate. While the Supreme Courts usage of the terms "arbitrary" and "disproportionate" are more commonly seen in applications of rational-basis or intermediate scrutiny, the *Pulizzano* court was correct: confrontation and compulsory rights are fundamental rights, and fundamental rights are subject to strict scrutiny. *see, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

victim and the defendant's personal knowledge of *prior relevant conduct* of the victim." *McMorris v. State*, 58 Wis. 2d at 150 (emphasis added). "[E]vidence of *prior crimes* is admissible when such evidence is particularly probative in showing elements of the specific crime charged". *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967).(Emphasis added)). It logically follows the test set out in *Pulizzano* is the applicable standard for reviewing whether a defendant's constitutional right to present *McMorris* evidence has been violated.

The first part of the *Pulizzano* test is that the defendant must show the acts clearly occurred. The offer proof *does not* need to be stated with complete precision, but should state an evidentiary hypotheses based on a sufficient statement of facts to warrant the conclusion or inference the trier of fact is urged to adopt. *State v. Dodson*, 219 Wis. 2d 65, ¶13, 580 N.W.2d 181 (1998). In Mr. Ochoa's offer of proof, there is a sufficient factual basis to warrant the conclusion the victim's prior bad acts did occur. Mr Ochoa Offered the following:

> [B]etween the years of 1993 and 1998 or 1999, Mr. Ochoa personally observe[d] approximately three-to-four instances of L.G. and F.L. engaging jointly in what he learned to be pre-emptive, violent and brutal attacks against third parties that involved kicking and punching the third parties to the ground during a night of drinking alcohol at Plaza Santa Maria de Torres in their home community in Mexico during rodeo events. During the same period of time and place, Mr. Ochoa personally observed L.G. in two-to-three separate instances launch similar style of attacks against third parties. Mr. Ochoa observed third parties, including the relatives of the owners of the Plaza Santa Maria de Torres, Chino Morales, intervene to break up the fights, and red cross workers attend to the injured third parties, whose faces were often cut and who were sometimes left unconscious, after L.G. and/or F.L. fled. Mr. Ochoa was aware that L.G. and F.L. would provoke the

> fights by intervening with a male who was dancing with his girlfriend to provoke him to fight, or threw Model beer cans at one or more males. In one instance, Mr. Ochoa recalls that L.G. stole a <<chicharra>>, or an electrical wire used to shock bulls that would sometimes be used by those trying to break up fights, and used it to shock the person who he was fighting to inflict additional carnage. Mr. Ochoa would indicate that although other males in his peer group would also pick fights at these types of events, he was aware of L.G. and F.L.'s reputation for behaving extremely violently and aggressively when drinking. Mr. Ochoa was also aware during the same relevant years that L.G. and F.L. would fight with others at annual fiestas, including festivals at San Sebastian el Grande in San Agustin and in Santa Maria in Tlajomulco, as well as Santa Anita in Tlaquepaque. Mr. Ochoa indicates that he was aware that L.G. and F.L. would use unconventional weapons such as rocks and broken beer bottles during these fights to inflict maximum carnage. From 1999 through 2017, both L.G. and F.L. on various occasions would reminisce in Mr. Ochoa's presence about their violent exploits in Mexico, ganging up and beating people in tandem, as well as fights they had been involved in while living in the United States, including California and Wisconsin. Mr. Ochoa never witnessed any of the fights in the United States, which L.G. and F.L. described themselves as having been violent and successfully ganging up on and beating up other individuals in a manner similar to what Mr. Ochoa had personally observed or been told about third-hand
> (R.108:2-3).

Notably, the State did not challenge whether the events occurred. (R.149:1, 2). ("[T]he State's only complaint is based on a vague challenge to remoteness and lack of particularity" (R.155:3)).

The second requirement of *Pulizzano* requires the defendant to show the acts closely resembled those of the present case. In 2017, F.L. and L.G. were together and drinking well into the early hours of the morning as loud music blared when they

instigated an aggressive two-on-one confrontation through escalating acts of loud, aggressive threats, threatening Mr. Ochoa through physical gestures, and resorting to unconventional, deadly weapons to back up their threats on his life. and were indisputably verbally aggressive and making threatening gestures with unconventional weapons. They were also listening to loud music. Whereas L.G. and F.L. may not have been physically present at a rodeo in Mexico at the moment F.L. threatened Mr. Ochoa's life, L.G. and F.L. were visibly impaired, operating in concert as they circled Mr. Ochoa, engaged in the same violent and unpredictable provocative, behavior, explosive anger, 16 and escalating use of dangerous weapons that signaled to Mr. Ochoa that violence was imminent.

There are distinguishing factors between the 2017 incident and the incidents of the mid-nineties. F.L. and L.G. were in their home instead of a public festival. There were no third parties who could intervene in the fight. F.L. and L.G. had ingested a large amount of cocaine[5] in 2017; there is no suggestion the two used cocaine in the nineties. In 2017, F.L. and L.G. both had access to potentially deadly weapons, knives, rather than the simple found objects of the nineties.

The prior acts do not have to be a perfect fit to the present case, they must only closely resemble the prior acts. While there are situational differences, the fundamental elements are the same: L.G. and F.L were provocatively instigating a violent and

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[5] F.L. had a blood alcohol concentration of 0.164, 230 ng/mL of Cocaethylene, and 540ng/mL of cocaine. (R. 353). L.G. had a B.A.C. of 0.168, 250 ng/mL of cocaethylene, 660 ng/mL of cocaine, and greater than 1000 ng/mL of Benzoylecgonine.(R. 347). Benzoylecgonine is the compound formed by the liver by the metabolization of cocaine. Cocaethylene is metabolite formed when cocaine and alcohol are co-administered; it isa more potent stimulant, which increases the effects of cocaine, including violence and psychotic symptoms. (R.493:92-98)

unpredictable attack while acting in concert, drunk, and resorted to whatever weapons were at their disposal to inflict maximum carnage. In all the ways that really matter, the two situations closely resemble each other, particularly in the context of a fluid situation in which an armed defender must make a split-second decision to assess the credibility of a threat on his life.

The third requirement in demonstrating a constitutional violation is the prior acts is clearly relevant to a material issue. The only issue at trial was whether Mr. Ochoa acted in self-defense. "When the accused maintains self-defense, he should be permitted to show he knew of specific prior instances of violence on the part of the victim. It enlightens the jury on the state of his mind at the time of the affray, and thereby assists them in deciding whether he acted as a reasonably prudent person would under similar beliefs and circumstances." *McMorris*, at 151. The pre-emptive, vicious attacks Mr. Ochoa's witnessed F.L. and L.G. commit are critical to understanding Mr. Ochoa's state of mind at the time of the affray.

Any armed defender whose life is threatened must assess the credibility of the threat based on personal knowledge of the instigating party's likelihood and ability to carry out a deadly threat. Mr. Ochoa has acknowledged that F.L.'s threat on his life, and furtive movement reaching for what he believed to be a weapon signaled that both he and L.G. were launching a violent attack. In this case, F.L.'s specific words informed him that he was facing a deadly threat. F.L. and L.G.'s countless violent, unpredictable and brutal two-on-one attacks when impaired informed his instinctive belief that L.G.'s threat was credible and the attack was imminent.

Fourth, the evidence must be necessary to the defendant's case. Again, whether Mr. Ochoa acted as a reasonably prudent

person was the central issue in the case. It was necessary to inform the jury of *why* Mr. Ochoa believed his life was in danger. Evidence of F.L. and L.G.'s violent, unpredictable, prior attacks involving escalating violence and unconventional weapons informs the jury why Mr. Ochoa perceived that F.L.'s death threat was credible, why he believed he had no choice but to make a split-second decision to terminate the threat by using potentially deadly force as F.L. reached for what Mr. Ochoa anticipated to be a weapon and F.L. charged at him after brandishing a knife just moments before, and Mr. Ochoa he believed that F.L. and L.G. would have, in fact, inflicted maximum carnage had he not defended himself against their imminent, deadly attack.

The final *Pulizzano* requirement is the probative value of the evidence must outweigh the prejudicial effect. The probative value of evidence is the ability of a piece of evidence to make a relevant disputed point more or less true. The probative value of F.L. and L.G's prior acts of violence is high; the evidence makes it more likely a jury would find the use of deadly force to be reasonable.[6] The prejudicial effect is low, the jury was instructed in F.L. and L.G.'s drug use and knew the two were not flawless individuals. Just as the prejudicial effect of other-acts evidence can be mitigated with a limiting instruction, the circuit court could have instructed the jury the evidence was only being offered to understanding Mr. Ochoa's state of mind and the reasonableness of his actions.

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[6] The circuit court originally stated it did not believe assaults which occurred 18 years ago could reasonably bear on the defendant's apprehension of danger and excluded the evidence as more probative than prejudicial. (R.477:29-30). Mr. Ochoa is not asking this court to determine if the circuit court correctly exercised its discretion. Mr. Ochoa is raising a constitutional challenge where the evidence and legal conclusions are reviewed *de novo*. *State v. St. George*, 2002 WI 50 16.

All five prongs of the test for demonstrating a constitutional violation depriving Mr. Ochoa of the right to present other-acts or *McMorris* evidence have been satisfied. The circuit court deprived Mr. Ochoa of his constitutional right to present evidence critical to his case. This Court must reverse and remand for a new trial with instructions to admit the proffered *McMorris* evidence.

C. The Circuit Court's Refusal To Allow Mr. Ochoa to Present Expert Testimony on his Behalf Deprived Him of his Constitutional Right To Present a Defense

1. Marty Hayes

Mr. Marty Hayes was offered as an expert to inform the jury on the principles and dynamics of violent encounters, use the physical evidence to infer the shooter location, and analyze the trajectory of bullets.[7]

In demonstrating the circuit court violate Mr. Ochoa's right to present expert testimony, Mr. Ochoa must first demonstrate the testimony of the expert witness met the standards of Wis. Stat. ¶907.02. *St. George* at ¶54. Since 2011, Wisconsin Courts have applied the *Daubert* standard governing the admissibility of expert witnesses. *Seifert v. Balink*, 2017 WI 2 ¶7, 372 Wis. 2d 525 (2017). This gatekeeping function requires the expert be qualified and the testimony is relevant. *Id.* At 57. An expert may be qualified as such upon the basis of their experience. *Id.* ¶ 18. When an expert is asked to instruct a jury on general principles, the expert must be qualified, the testimony must

[7] Interestingly the circuit court found Mr. Hayes' use of mannequins and trajectory rods to be unreliable, but allowed Deputy Krogstad to testify about his use of trajectory rods, despite Deputy Krogstad having only one training in general death investigations. (R. 477:35; 486:249, 169). In addition to his training and research, Mr. Hayes has attended at least five advanced trainings in death investigations, (R. 120:11-12)

address a subject matter in which the fact finder can be assisted by an expert, the testimony must be reliable, and the testimony must fit the facts of the case. *State v. Dobbs*, 2020 WI 64, ¶53, 392 Wis. 2d 505 (2020). Expert evidence can be based on personal experience as long as the witness can explain how their experience informs their opinions. *Seifert v. Balink*, 2017 WI ¶73.

Mr. Hayes is admissible as an expert witness on the basis of his experience. Mr. Hayes has been involved in firearms training for over 35 years both as a trainer for law enforcement and the private sector. (R. 120:2). Mr. Hayes had previously been accepted as an expert in over a dozen different courts in no fewer than five separate jurisdictions. (R.120:2). In addition to his role as President for both the Firearms Academy of Seattle and The Armed Citizens' Legal Defense Network, Mr. Hayes has published several works on the safe and proper use of firearms, and attended over 60 advanced trainings in the fields of firearms, use of force, and death investigations. In certain fields, experience is the predominant, if not sole basis for a great deal of reliable expert testimony. *Seifert v. Balink*, ¶77. As numerous courts have recognized, Mr. Hayes's experience and training is more than sufficient to qualify him as an expert.

Mr. Hayes' testimony as to the principles and dynamics of violent encounters is a subject matter which would assist the jury, and fits the facts of the case. Most individuals have not experienced violent encounters, and of those who have, even fewer have encountered a situation where deadly force is called for. Mr. Ochoa was in a violent encounter, and informing the jury of the principles a trained firearms user uses to asses these situations is directly related to the reasonableness of Mr. Ochoa's decision to defend himself with deadly force. This analysis covers

both the requirements for admissibility under *Dobbs* and the second and third prongs of the test for a constitutional violation as established in *St. George*.

There is no prejudicial effect to Mr. Hayes' testimony regarding the principles and dynamics of violent encounters. Mr. Hayes' expertise would only benefit the jury as they sought to determine if Mr. Ochoa's actions were reasonable.

Mr. Hayes's testimony is admissible under Wis. Stat. §907.02, the testimony is clearly relevant to the central issue in the case, it is necessary to inform the jury about a situation they are unlikely to have encountered, and there is no prejudicial effect of the testimony. All four *St. George* factors are fulfilled; by excluding Mr. Hayes' testimony, the circuit court violated Mr. Ochoas constitutional right to present a defense. The remedy is to remand for a new trial with instructions to permit Mr. Hayes or a similarly qualified expert to testify upon Mr. Ochoa's behalf.

2. Alfonso Villaseñor

Mr. Villaseñor was offered as an expert to translate the phrases <<Te va a lever la verga>>, and <<Ya the llevo la verga>>. (R.85: 3). These are the phrases F.L. allegedly repeatedly yelled at Mr. Ochoa. While the translators in the circuit court intreated this as "you are so screwed" Mr. Villaseñor translated these as "you're gonna get fucked up", and "you're fucked now". (R. 85:4-5).

Mr. Villaseñor is clearly an expert in interpreting Spanish slang. He lived in Mexico for 20 years, and has resided near the Mexican border since then. (R.85:1). He has been certified as a Spanish-to-English and English-to-Spanish translator in the United States Court System, is a member of the International Association of Conference Interpreters, interpreted for the State Department, the U.S. Consulate in Mexico, the Air Force, and the

Arizona Supreme Court. (R. 85:1). Mr. Villaseñor has been recognized by his peers as an expert in Mexican-Spanish slang and has presented on this topic at numerous conferences. (R.85:2). He has the training and experience to satisfy the reliability requirement of the *Daubert* standard.

The phrases F.L. directed at Mr. Ochoa directly impacted his state of mind and understanding Mr. Ochoa's is central to the jury's determination if Mr. Ochoa acted in a reasonable manner. In fact, one of the slang phrases communicates the death threat that directly caused Mr. Ochoa to believe that F.L. declared he was going to take Mr. Ochoa's life. While it is conceivable the court-provided translators would appropriately translate the phrases F.L. used, they in fact chose a translation which minimizes the threatening nature of the statements. There is a world of difference between someone stating "you are so screwed", and a notoriously violent individual yelling "You're gonna get fucked up" and "You're fucked now". Properly understanding these statements and the impact they had on Mr. Ochoa is necessary and central to his defense of reasonable self-defense.

The prejudicial effect of this testimony is low. The jury is under no obligation to believe Mr. Ochoa's testimony these words were said. The jury is free to disregard the statements if they do not believe they occurred. The probative value is high; these statements go to the heart of why Mr. Ochoa believed his life was in jeopardy. The probative value greatly outweighs any danger of prejudice to the State.

As all four *St. George* factors have been met, Mr. Ochoa has demonstrated his constitutional right to present evidence in his defense was violated. The proper remedy is to remand for a new trial with instructions to allow Mr. Villaseñor, or a similarly

qualified expert to testify to the true meaning of the phrases F.L. yelled.

3. Conrad Zvara

Mr. Zvara was offered as an expert to provide the jury with information on how the decision to use deadly force should be made, how to assess potential threats, what the "danger zone" for a firearm user is, whether it is reasonable to fire multiple shots at an aggressive assailant, and whether an unarmed person can cause death or great bodily harm. (R.119:2-4; 84:3). These are general principles subject to analysis under *Dobbs*.

Mr. Zvara was a member of the Milwaukee Police Department for 25 years, and after more than 30 years, retired from the U.S. Coast Guard reserve with the rank of Captain. (R.119:9). As a member of the MPD, Mr. Zvara was a distinguished expert in firearms, Trained with the U.S. Secret Service in Protective Operations, and is a certified instructor in the use of deadly force. (R.119:9). Mr. Zvara's expertise and training support the notion his testimony would be reliable. *Seifert v. Balink*, 2017 WI ¶77. This is supported by his qualification as an expert in both Milwaukee and Dunn counties. (R.119:10).

Mr. Zvara's testimony would serve to inform the jury on the central issue of the case: Why did Mr. Ochoa determine it was necessary to use deadly force against L.G. and F.L. Most laypersons have little to no experience in assessing threats of physical violence. Mr. Zvara's testimony on how to determine a credible threat, assess the damage a threat could cause, the ability of an attacker to swiftly close a distance of 32-50 feet, and the necessity of firing multiple rounds at a threat would all aid the jury in understanding Mr. Ochoa's state of mind, and determining if his actions were reasonable. There is a reasonable

fit to the case as Mr. Ochoa was within the "danger zone' of 32 feet, he had the training to assess a deadly threat, and fired multiple rounds. This analysis covers both the requirements for admissibility under *Dobbs* and the second and third prong of the test for a constitutional violation as established in *St. George.*

There is no prejudicial effect Mr. Zvara's testimony could have. The jury would be free to determine the credibility of Mr. Ochoa's account, and to determine whether Mr. Ochoa acted in a manner consistent with his firearms and self-defense training. Mr. Zvara's testimony is highly probative as it informs the jury as to what the current standards for using deadly force in self-defense are. This testimony would only seek to inform the jury as they deliberated whether Mr. Ochoa's actions were reasonable.

The four prongs of the *St. George* test are fulfilled; Mr. Ochoa has demonstrated his constitutional right to present a defense was yet again violated by the circuit court. This court must remand for a new trial with instructions to allow Mr. Zvara or a similarly qualified expert to testify.

## II. The Circuit Court's Abused its Discretion When It Refused To Allow Mr. Ochoa to Present Non Hearsay Statements

The admissibility of out of court statements are ordinarily governed by Wisconsin's hearsay statutes. Wis. Stat. §908.01. However, not all words said by a person outside of court constitute a "statement" for the purposes of the hearsay rule. An imperative statement, an order or instruction, does not constitute hearsay. *State v. Kurtz,* 2003 WI App 205, ¶36, 267 Wis. 2d 531; *State v. Wilson,* 160 Wis. 2d 744, 779, 46 N.W.2d 130 (Ct. App. 1991). Ordinarily the decision to admit or exclude evidence is a matter within the trial court's discretion, however when the trial court bases a discretionary decision on an erroneous view of the

law, it has exceeded its discretion. *State v. Kurtz*, 2003 WI App ¶33. Whether the circuit court applied the appropriate and applicable law is a question of law which appellate court determines independently of the circuit court, while benefitting from its analysis. *Foley- Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶83, 333 Wis. 2d 402 (2010).

Mr. Ochoa sought to introduce testimony of what L.G. said which led him to return to L.G.'s house in the early hours of the morning. (R.496:93). The State objected. (R.496:93). After a brief sidebar, the parties and court recessed to further research the issue. (R.496:94). At some point, Mr. Ochoa made an offer of proof which was not captured by the court record. (R.494:98). The circuit court was asked to consider *State v. Wilson*, where this Court held a statement offered only for the fact the statement was made and the effect it had on the listener's state of mind *was not hearsay*, and to preclude this testimony was to "preclude Wilson's presentation of a full defense". *State v. Wilson*, 160 Wis. 2d 744, 779, 467 N.W.2d 130 (Ct. App. 1991). (R.496:107). The circuit court sustained the State's objection and would not allow Mr. Ochoa to state what L.G. had said to him. (R. 496:109).

Mr. Ochoa filed a motion to reconsider overnight, relying on this court's decision in *State v. Kutz* as well as the *Wilson* decision. (R. 368: 3-5). As Mr. Ochoa stated in his motion, the *Kutz* court held "There is no dispute that an out-of-court instruction to do something is not hearsay when offered to prove that the instruction was give and, accordingly, to explain the effect on the person to whom the instruction was given." *State v. Kutz*, 2003 WI App 205, ¶36, 267 Wis.2d 531, citing *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 427, 351 N.W.2d 758 (Ct.

App. 184); *State v. Wilson*, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991).

The circuit court again rejected Mr. Ochoa's argument stating:

> The defense again relied on *Wilson* in part of the brief...I already addressed that yesterday. I said *Wilson* had one case distinguishing it, and it was a negative treatment. I didn't cite the case, but its *State v. Nieves*, 370 Wis.2d 260....Most of my decision was based on the *Wilson* case and the *Nieves* case and how I perceive these statements. (R.497:25-26).

Ordinarily the decision to admit or exclude evidence is a matter within the trial court's discretion, however when the trial court bases a discretionary decision on an erroneous view of the law, it has exceeded its discretion. *State v. Kurtz*, 2003 WI App ¶33. Whether the circuit court applied the appropriate and applicable law is a question of law which appellate court determines independently of the circuit court, while benefitting from its analysis. *Foley- Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶83, 333 Wis. 2d 402 (2010)

The circuit court's grossly misinterpreted the law governing the admissibility of L.G.'s instructions to "come back cousin". (R.368:5). As of October 2017, *Wilson* had been cited to positively 11 times, and in *State v. Nieves*, this court distinguished *Wilson* in an unpublished, non-precedent opinion. *State v. Nieves*, 2016 WI App 50, 370 Wis. 2d 260, reversed by, *State v. Nieves*, 2017 WI 69, 376 Wis. 2d 300. The circuit court also failed to consider *Kutz*, in which this court clearly confirmed *Wilson*'s validity. In addition to citing to *Wilson*, *Kutz*, cites to *State v. Curbello-Rodriguez* for the proposition when a statement is offered to prove its effect on the listener it is not hearsay. *State v. Curbello-Rodriguez*, 119 Wis. 2d at 427. As of October 2017, this court has cited to this specific provision approvingly in six separate cases.

*Wilson* and *Curbello-Rodriguez* remain the controlling legal standards.

Abuses of discretion are generally subject to harmless error analysis. *Wilson* at 780. The test for harmless error is whether there is a reasonable possibility the error contributed to the conviction, and the burden of proving the error was harmless rests on the State. *Id.* The State's closing argument foreclose any argument this error was not harmless. Initially, the State urges the jury not to believe Mr. Ochoa's account; if he were so worried about his cousin, why wouldn't he stay and talk, why would he place his phone in airplane mode, why would he wake up in the middle of the night, why wouldn't he call. (R. 499:142-144). The State argued Mr. Ochoa's actions simply did not make sense. (R.499:144). It is certainly hard for the defense to explain Mr. Ochoa's actions when the court forbade him from doing so. Later, the State asks the question "Did the defendant intend to kill Luis and Fernando when he went over there the second time?" (R.499:271). No, but the circuit court forbade Mr. Ochoa from fully explaining himself, creating doubt which the State capitalized on. Most damningly, the State addressed the jury and stated:

> If you were to decide he's even not guilty of second-degree intentional homicide, the facts and circumstances of *where he put himself* and how his action and his behaviors created this unreasonable and substantial risk of death or great bodily harm he was aware of and engaged in the behavior nonetheless. (R.499:154)(emphasis added).

Indeed, the Jury decided Mr. Ochoa was not guilty of second degree intentional homicide, but convicted him of first degree reckless homicide, the exact crime the State was speaking of, and taking advantage of the circuit court's erroneous ruling.

The circuit court's view of the law regarding the admissibility of L.G.'s instruction is clearly erroneous. This wildly erroneous interpretation of the applicable case law cannot be allowed to stand, and the error was not harmless, particularly when the State used it in a manner to prevent the defense from fairly responding with evidence to its argument supporting a conviction to the very offense Mr. Ochoa was convicted, First Degree Reckless Homicide.

## III. The Circuit Court Failed To Properly Instruct the Jury on the Applicable Law of Self-Defense

### A. Legal Overview and Standards of Review

Circuit courts have broad discretion to instructing a jury. *State v. Dodson*, 219 Wis. 2d 65, 86, 580 N.W.2d 181 (1998). The courts discretion should be exercised to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence. *State v. McCoy*, 143 Wis. 2d 274, 289 (1988). The instructions must be supported by the facts of the record, and the instruction must correctly state the law. *Kochanski v. Speedway Super America, LLC,* 2014 WI 72 ¶10, 356 Wis. 2d 1 (2014). Appellate courts review whether these two criteria have been met *de novo*. *State v. Fonte*, 2005 WI 77 ¶9, 281 Wis. 2d 654 (2005). An error in the jury instructions is subject to harmless-error analysis, and the instructions must be considered in their entirety. *State v. Paulson*, 106 Wis. 2d 96, 108, 315 N.W.2d 350 (1982). A proper jury instruction is a crucial component of the fact-finding process and the validity of the jury's verdict depends on the completeness of the instructions. *State v. Perkins*, 2001 WI 46, ¶40, 243 Wis. 2d 141 (2000).

B. The Circuit Court's Refusal To Properly Instruct the Jury Requires Mr. Ochoa's Conviction Be Reversed and a New Trial Granted

The Wisconsin statutes provide a person is privileged to use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his person...the use of force which is intended or likely to cause death or great bodily harm is only permissible when the person reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself. Wis. Stat. §939.48(1). Wis. Stat. §939.22(32) clarifies that reasonably believes means the person believes a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous. Wis. Stat. §939.22(32). Wisconsin pattern jury instruction 805 incorporates this language, informing the jury a belief may be reasonable even though mistaken. WIS JI-Criminal 805. Jury instruction 805 was not read to the jury. (R.393).

The circuit court read jury instruction 1016 to the jury which instruct the jury on First degree homicide, self-defense, and the lesser included charges of second degree intentional homicide, and first degree reckless homicide. (R.393:4-15). The instruction frequently mentions a defendant's reasonably belief, but inexplicably *never informs the jury a belief may be reasonable even if mistaken*[8].

This glaring omission was brought to the circuit courts attention, and yet the circuit court determined it would not alter erroneous instructions to accurately state the law of self-defense.

[8] It is estimated between 20 and 33% of police shooting occur where the professional law enforcement officer has misperceived a threat. (R.490:40). In similar studies analyzing civilians, civilians make the same mistakes, but at a higher frequency. (R.490:42).

(R.499:84-87). The circuit court was asked to follow "the legislative statutory language" as it relates to instructing the jury as to "what they need to do to understand that key term, reasonable belief." (R.499:86). The circuit court requested case law supporting this argument, and when counsel for Mr. Ochoa responded the statutory language speaks for itself, the court replied it would not alter the pattern instruction without case law. (R.499:86-87). Very plainly, pattern jury instruction 1016 omits critical language from its instructions on self-defense. It does not accurately support the law.

This is an error sufficient to require reversal. When a circular court inadvertently uses a wrong word such as "mental conduct: instead of "criminal conduct" the ordinary meaning is usually sufficiently apparent to the ordinary mind and does not require reversal. *Wilson v. State.* 59 Wis. 2d 269, 291, 208 N.W.2d 134 (1973). Likewise, an error in a specific instruction can be renewed harmless because of other correct statements of the laws elsewhere in the instructions. *Kimmons v. State,* 51 Wis.2d 266, 268, 186 N.WW.2d 308.

These situations are inapposite in this case. This was not a simple confusion of an ordinary word. The legislature specifically defined the legal phrase reasonable belief, and the circuit court willfully chose to omit this statement. If pattern jury instruction 805 had been given to the jury, this error would have been harmless, but the court refused to give this corrective instruction as well. This was a significant omission of a specially defined legal term which was not corrected anywhere in the instructions. If this operative phrase in defining self-defense were not legally significant, the legislature would not have specifically chosen that operative phrase to fully define the privilege of self-defense.

Mr. Ochoa has always claimed he acted in self-defense. Whether his beliefs were reasonable is the central question of this trial. When an instruction goes to the heart of the defendant's claim of self-defense and alters the legal standards, the error is harmful. *Werner v. State*, 66 Wis. 2d 736, 226 N.W.2d 402 (Holding a circuit court's use of the incorrect alternative wording required the jury find the intent to kill prior to analyzing the privilege of self-defense even though the jury was previously properly instructed on the privilege.).

The circuit court's refusal to instruct the jury as to a specific legal definition which lay at the heart of Mr. Ochoa's defense requires reversal, and remand for a further trial in which the jury is instructed properly as to self-defense. Mr. Ochoa also requests this court recommend the Wisconsin Jury Instruction Committees correct pattern instructions 1014, 1016, 1017 and 1052 to accurately state the law of self-defense.

## Conclusion

A tragedy occurred during the early morning of July 30, 2017 when Sergio Ochoa shot and killed his his cousin L.G. and his cousin's best friend, F.L.. Another tragedy occurs each day Sergio Ochoa is held in prison on the basis of the trial which occurred in October of 2019 which prevented him form presenting critical evidence to the jury and fully arguing the law on the central issue in his case. This court, and the public, can have no confidence in this trial as the circuit court prevented Mr. Ochoa from exercising his constitutional rights to present a defense, chose to ignore the statutory definition and evidence at the very heart of Mr. Ochoa's self-defense 31 claim, despite clear binding legal precedents on issues central to both the factual and legal disputes.

Respectfully, this Court must overturn Mr. Ochoa's conviction and remand for a new trial in which Mr. Ochoa is able to introduce the violent acts he witnessed F.L. and L.G. commit that informed his decision to use deadly force in response to F.L.'s death threat; introduce proper translations of the slang, Spanish threats F.L. used so the jury can fully understand the words that caused Mr. Ochoa to believe deadly force was imminent; explain his state-of-mind for why he returned to L.G.'s residence at L.G.'s request so the jury can better understand the narrative context for the dynamic that led to F.L. and L.G.'s threat on Mr. Ochoa's life; educate the jury on the reliable principles of the use of self-defense and deadly force; and have the trial court instruct the jury accurately on the law of self-defense.

Dated: Friday, April 23, 2021
Respectfully submitted,

Electronically Signed by:
Steven Roy
Attorney for the Defendant
Wisconsin State Bar No. 1115155

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I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,382 words.
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I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.
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