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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2020AP2135-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

NICHOLAS REED ADELL,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

Appeal from An Order Granting Suppression
Entered In Sauk County Circuit Court,
Honorable Michael P. Screnock, Presiding.
Circuit Court Case No. 2019 CF 388

NICHOLAS REED ADELL,
Defendant-Respondent
Marcus J. Berghahn
Wisconsin Bar No. 1026953
HURLEY BURISH, S.C.
33 East Main Street, Suite 400
Madison, WI 53703
mberghahn@hurleyburish.com
(608) 257-0945

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ISSUE PRESENTED

Based on the record developed at the evidentiary hearing, and consistent with prior decisions of this Court, the Circuit Court held that the deputy Sheriff unlawfully expanded the scope of a traffic stop when, based on the smell of alcohol (which could have been coming from the either the passenger or the driver) and his knowledge that the driver's prior OWI convictions subjected him to the .02 blood alcohol concentration standard, he required the driver to perform field sobriety tests. The Circuit Court held that the deputy "was jumping too far with that leap," R24:10, because he was not "armed with enough facts at that moment to put Mr. Adell through field sobriety tests," *id.* at 9-10, the Court granted the motion to suppress.

Did the Circuit Court clearly err in its factual findings or err in its application of the constitutional definition of reasonable suspicion?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue raised in this appeal can be fully addressed by briefing, but if the Court has questions, Nicholas Adell welcomes the opportunity for oral argument. The decision of the Court should be published if the matter is decided by three judges, as is this Court's practice. Publication is warranted under § 809.23(1)(a)1. or 3.

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from an Order by the Circuit Court excluding evidence obtained by a deputy Sheriff when he expanded the scope of a traffic stop by requiring the driver perform field sobriety tests without evidence of impairment. The Circuit Court found that the deputy relied on two facts to expand the scope of his investigation: the smell of alcohol coming, indistinctly, from inside the vehicle, and the driver's prior OWI convictions which made him subject to the .02 blood alcohol concentration standard. But those two facts were not enough to establish reasonable suspicion.

The Circuit Court held that the deputy lacked sufficient facts to lawfully expand his investigation to determine whether Nicholas Adell was operating a motor vehicle with a prohibited alcohol concentration: the Deputy was not "armed with enough facts at that moment to put Mr. Adell through field sobriety tests." R24:9-10. Because "he was jumping too far with that leap," *id.* at 10, the Circuit Court suppressed the evidence developed by Deputy Schlough. *Id.*

Procedural Status and Relevant Facts. Nicholas Adell was charged in Sauk County Circuit Court with violating WIS. STAT. § 346.63(1)(a), operating a motor vehicle while impaired as a fifth or sixth offense. R1. Adell was bound over for trial, *see* R27, and then moved to suppress evidence, asserting that law enforcement lacked sufficient facts to expand an initial traffic stop into an investigation for operating with a prohibited alcohol concentration. R14.

Testimony offered at an evidentiary hearing on August 1, 2019, established that, at about 5:50 a.m., Sauk County Deputy Sheriff Brian Schlough stopped a motor vehicle for speeding, based on a radar reading. R23:8. The vehicle stopped when Deputy Schlough turned on his emergency lights. *Id.* at 20. In the time—about one minute—that he observed the vehicle, Deputy Schlough did see any movement by the vehicle suggestive of impairment. *Id.* at 19-20.[1]

Nicholas Adell was identified as the driver of the vehicle. *Id.* at 10. There was also a passenger in Adell's vehicle, Isaac Zimmerman, who Deputy Schlough identified. *Id.* Other than to provide his name, the passenger did not speak with Deputy Schlough. *Id.* at 38. Adell explained that "he was going to his place of employment at Devil's Head Resort and that he was running late for work." *Id.* at 11. Adell apologized for speeding. *Id.* at 22.

As Deputy Schlough spoke with Adell, he noticed an odor of intoxicants coming from inside the vehicle. *Id.* He had no independent recollection of what the odor smelled like. *Id.* at 24. But Deputy Schlough could not tell whether the odor of alcohol was specifically coming from Adell or the passenger. *Id.* Deputy Schlough reported no observations about how Zimmerman, the passenger, talked, moved or appeared. *Id.* at 27.

Deputy Schlough observed that Adell's eyes were "somewhat bloodshot" and "glassy in appearance." *Id.* at 25. This made the observation "less than more"

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[1] While Deputy Schlough stopped Adell for speeding, his testimony gave no basis for the Circuit Court to infer that Adell's speeding was a sign of impairment any more than if the deputy had observed an equipment violation on Adell's vehicle.

suspicious. *Id.* But at the hearing, Deputy Schlough didn't have an independent recollection of what Adell's eyes looked like. *Id.* at 26.

Deputy Schlough did not observe other common indicia of impairment. For example, Deputy Schlough testified that Adell's speech wasn't slurred, and Adell made no inconsistent responses or unusual statements. *Id.* at 28. So too, Adell did not appear to be nervous. *Id.* at 29. During his initial contact with Deputy Schlough, Adell showed no signs of impaired coordination. *Id.* at 28. Adell had no difficulty in producing his driver's license and other documents requested by Deputy Schlough; and he had no problem following Deputy Schlough's instructions. *Id.* In short, Deputy Schlough agreed, nothing in the way that Adell responded or behaved suggested impairment. *Id.* at 29. Nor did Deputy Schlough observe any other indicia of impaired driving, such as open intoxicants in Adell's vehicle. *Id.* at 29. Finally, the time of the stop was not near in time to when bars close. *Id.*

When asked, Adell admitted to consuming alcohol "the prior evening." *Id.* But Deputy Schlough did not ask how much Adell drank, when he started drinking, or when he stopped drinking. *Id.* at 27.

Having completed his initial contact with Adell, Deputy Schlough returned to his squad "and ran Mr. Adell through dispatch." *Id.* He was informed that Adell had four prior convictions for operating while intoxicated. *Id.*

Deputy Schlough returned to Adell's vehicle. *Id.* at 30. At the outset of his second contact with Adell, Deputy Schlough made no further observations of Adell's behavior that was suspicious or unusual. *Id.* at 32. Nor

did Deputy Schlough ask additional questions to elicit information about when Adell last drank, what he drank or how much he drank.

He "recontacted Mr. Adell and requested him to exist his vehicle … to perform field sobriety tests." *Id.* at 12. Adell complied. *Id.* Deputy Schlough had no other reason to remove Adell from his vehicle. *Id.* at 19. At this point, Deputy Schlough was not investigating a speeding violation—the initial justification for the stop. *Id.* at 32. Rather, as Deputy Schlough explained, he expanded the reason for the stop to a separate investigation—either operating a motor vehicle while intoxicated, or operating a motor vehicle with a prohibited alcohol concentration. *Id.*

> Based on all my observations during the stop, the bloodshot eyes, glassy in appearance, the odor, Mr. Adell's—or excuse me, his admitting to me that he had consumed alcohol the prior evening, also know that he had four prior convictions and that he was under a .02 restriction.

Id. at 12.

While Deputy Schlough knew it would not take much alcohol to reach a .02 blood alcohol concentration, *id.*, he also testified that the strength of the odor of alcohol doesn't inform as to how much alcohol the individual consumed. *Id.* at 23. Moreover, though he was trained in detecting signs of impairment, Deputy Schlough was not trained to evaluate a driver's blood alcohol concentration based on when a subject started drinking, when the stopped and how much they drank in between. *Id.* at 31. In short, Deputy Schlough admitted that he was not

trained to be able to evaluate Adell's blood alcohol concentration at the time of the traffic stop. *Id.*

After the close of evidence, Judge Screnock made findings of fact. *Id.* at 62-64. Judge Screnock found that Deputy Schlough "did not observe other potential indications of intoxication, including slurred speech, lack of coordination, loss of balance" and he "did not inquire of the passenger whether the passenger had consumed any alcohol." *Id.* at 64. At the close of the hearing, the question posed by Judge Screnock was whether the Court could give any weight to "Deputy Schlough's testimony relating to the odor of intoxicants and the bloodshot and glassy eyes based on his testimony here today, based—on the evidence presented at the motion hearing today." *Id.* at 67-68.

The parties offered additional briefs in support of their respective positions. R15, R16.[2] The Court made an oral ruling on Adell's motion. R24. Judge Screnock ruled that "the Court cannot give any weight to Deputy Schlough's testimony regarding the state of [Adell's] eyes, that he testified he had no independent recollection of his eyes." *Id.* at 7.

> And so while I remain satisfied that Deputy Schlough had sufficient facts to extend the stop for the purpose of performing a PAC investigation, in the words of the Court of Appeals in *Quitko*, he didn't—he was not armed with enough facts at that moment to put Mr. Adell through field sobriety tests.

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[2] The State conceded that Deputy Schlough's testimony did not establish personal knowledge of the appearance of the defendant's eyes. *See* R16:6-7. *See also* Brief of Plaintiff-Appellant at 9 n.2.

Id. at 9-10. Because Deputy Schlough did not remove Adell from his vehicle to determine whether the odor of intoxicants came from him (or the passenger) or do any further investigation before putting Adell through the field sobriety tests, Deputy Schlough was "jumping too far with that leap." *Id.* at 10.

Judge Screnock granted Adell's motion, and he entered a written Order on November 3, 2020. R17. The State timely appealed Judge Screnock's Order on December 18, 2020. R18.

ARGUMENT

I. BASED ON THE RECORD DEVELOPED AT THE EVIDENTIARY HEARING, THE CIRCUIT COURT CORRECTLY DETERMINED THAT DEPUTY SCHLOUGH LACKED REASONABLE SUSPICION TO REQUIRE NICHOLAS ADELL TO PERFORM FIELD SOBRIETY TESTS.

A. Standard of Review.

Whether evidence should be suppressed is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. When this Court reviews a Circuit Court's ruling on a motion to suppress evidence, it applies the clearly erroneous standard to the Circuit Court's findings of fact and the application of constitutional principles to the findings of fact is reviewed de novo. *State v. Floyd*, 2017 WI 78, ¶11, 377 Wis. 2d 394, 898 N.W.2d. 560. A finding of fact is clearly erroneous if it is against the great weight and clear preponderance of the evidence. *State v. Anderson*, 2019

WI 97, ¶20, 389 Wis. 2d 106, 935 N.W.2d 285. The clearly-erroneous standard of review is highly deferential:

> If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985). Given the "fact-specific" nature of evaluating the evidence presented at the evidentiary hearing on whether sufficient facts support a finding of reasonable suspicion, this Court must defer to the Circuit Court's factual findings and affirm the Circuit Court's order.

B. Legal Principles.

A temporary detention such as during a traffic stop is a seizure which must conform to the constitutional requirement of reasonableness. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. A law enforcement officer may stop a vehicle when he reasonably believes the driver has violated a traffic law. *State v. Hogan*, 2015 WI 76, ¶34, 364 Wis. 2d 167, 868 N.W.2d 124. An officer may lawfully extend a traffic stop if he learns of "additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate" from the violation that prompted the officer's initial investigation. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. An extension of a valid

stop must be supported by reasonable suspicion. *Hogan*, 364 Wis. 2d 167, ¶ 35.

Before he may require a driver to submit to field sobriety tests the deputy must have obtained additional information during the initial traffic stop that supports reasonable suspicion that the driver was operating the vehicle while under the influence of alcohol. *See Hogan*, 364 Wis. 2d 167, ¶¶11, 34-35, 53 (where officer initially stopped vehicle because driver was violating seat belt law, extension of stop to administer field sobriety testing was unlawful where unsupported by reasonable suspicion).[3] Whether the officer has sufficient facts to support reasonable suspicion is evaluated based on the totality of the circumstances. *State v. Anderson*, 2019 WI 97, ¶33, 389 Wis. 2d 106, 935 N.W.2d 285. The standard requires the officer "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. "Reasonable suspicion" is "suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or hunch . . . will not suffice.'" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

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[3] *See* WIS. JI-CRIMINAL 2663 ("'Under the influence of an intoxicant' means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage ... What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.")

C. *The Circuit Court Did Not Clearly Err In Its Factual Findings or In Its Application of Constitutional Principles To Its Factual Findings.*

The Circuit Court heard testimony, received evidence, and invited written and oral argument from the parties. Based on the record, it found that Deputy Schlough "was not armed with enough facts at that moment to put Mr. Adell through field sobriety tests." *Id.* at 9-10.

The Circuit Court explained that, due to the manner in which the testimony was elicited at the evidentiary hearing, it could not "give any weight to Deputy Schlough's testimony regarding the state of [Adell's] eyes." R24:7. This left the Circuit Court with two data points on which to determine whether Deputy Schlough had reasonable suspicion to remove Adell from his vehicle: a smell of alcohol coming from inside of Adell's vehicle, and Adell's prior record, which subjected him to the .02 blood alcohol concentration standard.

Because Deputy Schlough did not remove Adell from his vehicle to determine whether the odor of intoxicants came from Adell or from Zimmerman, and he did not do any other investigation before putting Adell through the field sobriety tests, Deputy Schlough was "jumping too far with that leap." *Id.* at 10. Thus, the Circuit Court concluded that requiring Adell to perform field sobriety tests was an unreasonable seizure. *See id.* Application of the legal principles to the facts should result in affirmance of the Circuit Court's conclusion.

At the close of the evidentiary hearing the Circuit Court made findings of fact. The Circuit Court found that Deputy Schlough:

* stopped Adell for speeding;

* failed to observe any other indications of illegal or suspicious driving behavior or equipment violations or anything else that raised any concerns from his perspective as a law enforcement officer;

* did not observe slurred speech, lack of coordination, loss of balance;

* observed an odor of intoxicants coming from the vehicle;

* observed that there was a passenger in the vehicle;

* failed to inquire whether the passenger had consumed any alcohol;

* failed to investigate whether the passenger was the source of the odor of intoxicants;

* observed that the driver's eyes were somewhat bloodshot and glassy in appearance;

* learned that Adell had consumed some alcoholic beverage the prior evening;

* learned that Adell was headed to work and that he was running late and that was the reason for his speeding;

* learned that Adell had a valid license and four prior OWI convictions; and

* knew that it would not take much alcohol consumption for an individual to get to a .02 blood alcohol concentration.

R23:62-64.

The question posed by the Circuit Court at the close of the evidentiary hearing was whether Deputy Schlough's testimony about observations regarding the odor of intoxicants and the appearance of Adell's eyes could be given any weight in the determination of reasonable suspicion given that he testified that he didn't independently recall what Adell's eyes looked like or what the odor of alcohol smelled like. *See* R23:24-26.[4] If the deputy's testimony was not competent evidence, then the Court could not rely on it in determining whether sufficient facts supported reasonable suspicion: "But without the odor of intoxication—odor of intoxicants emanating from the vehicle or the bloodshot and glassy eyes, we would have a driver speeding at .02 and that would not be sufficient." R23:66.

When the Circuit Court ruled on the issue, it determined that "the Court cannot give any weight to Deputy Schlough's testimony regarding the state of his eyes, that he testified he had no independent recollection of his eyes." R24:7. That the Circuit Court gave no weight to Deputy Schough's observation of Adell's eyes did not come as a great surprise as, prior to the oral ruling, the State "concede[d] that Deputy Schough's testimony did not establish personal knowledge of the appearance of the defendant's eyes." R16:6; *see also id.* at 7 ("Accordingly, the State concedes that Deputy Schlough's testimony with regard to the appearance of

[4] The State did not move to admit Deputy Schlough's written report. The Circuit Court commented "I think everybody in the room believes there was a way in which that evidence could have come in, but it didn't, and it's not in the record and so the Court cannot rely on it." R24:7-8.

the defendant's eyes was properly challenged by the defendant on personal knowledge grounds.")

The Circuit Court's application of legal principles was not clearly erroneous. In reaching its decision, the Circuit Court cited to *State v. Quitko*, 392 Wis. 2d 908, 945 N.W.2d 367 (Ct. App. 2019), an unpublished case decided by three judges. *See* R24:6-7. *Quitko* applied *State v. Goss*, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918, to a case where police expanded the investigation into whether a driver was operating with a prohibited alcohol concentration.[5] In *Quitko*, like here, the driver was subject to a .02 blood alcohol concentration standard, and the officer knew that that the driver would not need to consume much alcohol to exceed that limit. But unlike this case, the officer smelled alcohol on the driver's breath. In *Quitko*, like here, the State relied on the odor of an intoxicating beverage to argue that the legal standard to pursue further investigation had been satisfied. In *Quitko*, like here, because the three *Goss* conditions were not satisfied, the expansion of the investigation was found to be factually unsupported and, therefore, legally lacking.

Like in *Quitko*, Deputy Schlough testified to having taken courses in relation to standardized field sobriety tests and he had conducted numerous OWI-related arrests. *See* R23:7. But nothing about this testimony concerned

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[5] Like this case, *Quitko* began with a traffic stop for speeding. The State cites to a number of cases involving speeding to argue that the traffic offense is another indicia of impairment. *See* Brief of Plaintiff-Appellant at 10. But no such connection was established at the evidentiary hearing. The cases cited by the State involve other conduct that reflects impairment such as unsafe driving or weaving, neither of which was observed in this case.

his knowledge of, or experience with, how much alcohol an individual may consume before exceeding a .02 blood alcohol concentration standard. R23:31. *Goss* requires such knowledge, and it is not present in this case.

Unlike the officer in *Goss*, but like of the officer in *Quitko*, Deputy Schlough did not testify that he smelled the odor of intoxicants coming from Adell himself. R23:24; *see Goss*, 338 Wis. 2d 72, ¶17. Rather, Deputy Schlough testified that while an odor of intoxicants was coming from the vehicle, he was unable to pinpoint whether it was coming from Adell or his passenger. *Id.* And, as the Circuit Court found, Deputy Schlough took no investigative steps to determine whether the smell was, indeed, coming from Adell. *See* R24:9-10. In the specific context concerning the odor of intoxicants, our supreme court has counseled that subtle differences may either raise or lower the probability that the driver of the car from which the odor is emitting has committed a crime. *See State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999) (linking an odor of a controlled substance to a specific person provides probable cause to arrest). In *Quitko*, like here, the officer did not smell the odor of an intoxicating beverage coming from Quitko himself—but instead inferred from the generalized "slight odor of an intoxicating beverage or intoxicants emitting from the vehicle." *Quitko*, 392 Wis. 2d 908, ¶ 20. In the absence of further investigation, the evidence does not support the inference that the odor was coming from Adell.

The State argues that, when a deputy is confronted with a situation in which he is investigating a possible violation of operating a motor vehicle with a prohibited alcohol concentration, it shouldn't matter that the deputy doesn't observe clues of impairment. He should be able to rely on his knowledge that someone who has

consumed only a small amount of alcohol is likely to have exceeded the .02 blood alcohol concentration standard. This knowledge, the State argues, meets the reasonable suspicion standard. *See* Brief of Plaintiff-Appellant at 11-15. The argument should be rejected.

Such an argument ignores that the Court, in *Goss*, avoided making such a generalization and, instead, focused on the officer's actual knowledge. Goss, 338 Wis. 2d 72, ¶ 23.[6] Next, such an argument is contrary to the approach taken by the legislature: it did not create an absolute sobriety condition. Rather, the legislature chose to allow drivers with prior OWI convictions to operate a vehicle with a .02 PAC standard. *Goss*, 338 Wis. 2d 72, ¶ 12. Last, in light of the fact that an officer may not have knowledge of, or experience with, how much alcohol an individual may consume before exceeding a .02 blood alcohol concentration standard it can't be common sense to conclude that someone who has consumed only a small amount of alcohol is likely to have exceeded the .02 PAC standard. To do so oversimplifies the relevant facts that must be considered before a trained individual can estimate a person's blood alcohol concentration. *See, e.g., State v. Vick*, 104 Wis. 2d 678, 683, 312 N.W.2d 489 (1981). And, here, Deputy Schlough testified that he did not have such training. R23:31.

In sum, viewing the evidence in the light most favorable to Adell and deferring to the Circuit Court's findings of fact, this Court should find that the Circuit Court's findings of fact were not clearly erroneous. *See Vogt*, 2014 WI 76, ¶¶ 17, 41; *accord State v. Goyette*, 2006 WI App 178,

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[6] *See State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (Ct. App. 1990) (police officers need an objectively reasonable inference of wrongful conduct in order to support a finding of reasonable suspicion).

¶ 22 n.11, 296 Wis. 2d 359, 722 N.W.2d 731. So too, the Circuit Court's application of the facts the law was not clearly erroneous: the reliance on an odor of intoxicant—that isn't determined to come from the driver, even where the driver is subject to the .02 blood alcohol concentration standard, and has admitted to consuming alcohol during "the prior evening"—is not sufficient to satisfy the legal standard to allow Deputy Schlough to expand his investigation. *See Village of Little Chute v. Rosin*, No. 2013AP2536, 2014 WL 700439 (unpublished) ¶ 16 ("an officer may not conduct field sobriety tests merely because the officer's traffic stop was supported by reasonable suspicion. To lawfully request a driver perform field sobriety tests, an officer must have some evidence of impairment."), and ¶ 17 ("the requisite quantum of evidence for field sobriety testing should be at least equal to that of the initial stop's reasonable suspicion requirement."). Thus, as soon as Deputy Schlough removed Adell from the vehicle to perform field sobriety tests, Adell's seizure was unreasonable. The Circuit Court was correct on the record before it to exclude the evidence developed after that point in time.

CONCLUSION

For the reasons he offers here, Nicholas Reed Adell respectfully requests that this Court **AFFIRM** the judgment of the Sauk County Circuit Court.

Dated at Madison, Wisconsin, May 19, 2021.

Respectfully submitted,

NICHOLAS REED ADELL,
Defendant-Respondent

Marcus J. Berghahn
Wisconsin Bar No. 1026953
HURLEY BURISH, S.C.
33 East Main Street, Suite 400
Madison, Wisconsin 53703
[608] 257-0945
mberghahn@hurleyburish.com

CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c) for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 3,955 words. *See* WIS. STAT. § 809.19(8)(c)1.

Marcus J. Berghahn

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12).

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on the opposing party.

Marcus J. Berghahn