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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP21-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ROBERT K. NIETZOLD, SR.,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

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The State of Wisconsin petitions this Court to review the Wisconsin Court of Appeals' decision in *State v. Robert K. Nietzold, Sr.*, case number 2021AP21-CR (Wis. Ct. App. Dec. 9, 2021). The court of appeals reversed an order of the circuit court denying resentencing based on the prosecutor's initial breach of the plea agreement at sentencing, and remanded for resentencing before a different judge.

In a judge-authored opinion citable in Wisconsin courts, the court of appeals held that resentencing was mandated when the prosecutor initially sought a specific term of imprisonment, a recommendation that violated the plea agreement. The court so held even though the prosecutor's mistake was apparently remedied at the sentencing hearing—defense counsel objected to the prosecutor's error, the prosecutor immediately withdrew the mistaken recommendation, and then made the State's promised recommendation of imprisonment with the specific term left up to the court. Later in the hearing, the prosecutor even went so far as to interrupt the court to reassert that the State was not recommending a specific term of imprisonment when, in discussing the PSI author's specific recommendation, the court imprecisely referred to that recommendation as "the state's," rather than "the department's," recommendation.

STATEMENT OF THE ISSUE

In *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997), this Court held that when a prosecutor agrees not to recommend a specific term of imprisonment, then makes such a recommendation at the sentencing hearing, defense counsel renders ineffective assistance by not timely objecting to the prosecutor's breach. An unobjected-to recommendation of a specific prison term after the State promised to make no such recommendation is a "material and substantial" breach of the plea agreement requiring resentencing. *Id.* at 281.

But a timely objection to a plea breach at sentencing allows for the opportunity to remedy the breach. *See Smith*, 207 Wis. 2d at 273. When, as here, defense counsel objects to a sentencing recommendation that violates the plea agreement, and the prosecutor withdraws the mistaken recommendation, resentencing is unnecessary because the initial breach has been remedied. *See State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255; *State v. Knox*, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997).

Here, the prosecutor initially breached the plea agreement by inadvertently recommending a specific term of imprisonment. But defense counsel objected, and the prosecutor remedied the error by immediately withdrawing the mistaken recommendation and substituting the recommendation promised in the plea agreement. Nonetheless, the court of appeals held that the prosecutor's initial breach was "self-evidently" "material and substantial," and thus resentencing was required, citing *Smith*. Neither the parties nor the court addressed *Knox* or *Bowers*.

Should this Court take review and reverse because the court of appeals' judge-authored opinion is plainly contrary to *Smith*, *Bowers*, and *Knox*, and is citable in Wisconsin courts?

STATEMENT OF CRITERIA SUPPORTING REVIEW

1. Review is warranted because the court of appeals' decision misreads this Court's decision in *Smith*, and it is contrary to *Smith* and two published decisions of the court of appeals. *See* Wis. Stat. § (Rule) 809.62(1r)(d) (review may be appropriate when the court of appeals' decision is in conflict with controlling decisions of this Court and the court of appeals).

2. Review is also necessary because this wrongly decided opinion is judge-authored and likely to result in confusion because it is citable in Wisconsin courts. *See* Wis.

Stat. § (Rule) 809.62(1r)(c) (review is appropriate when a decision of this Court would clarify the law).

STATEMENT OF THE CASE

Nietzold was charged in Vernon County Circuit Court with five counts of second-degree sexual assault of a child for assaulting his daughter. (Pet-App. 102, 115–23.) Pursuant to a plea agreement, Nietzold pleaded no contest to one count charged in an amended information of repeated sexual assault of the same child. (Pet-App. 101.) At the plea hearing, the court accepted Nietzold's plea and ordered the Department of Corrections to prepare a presentence investigation report (PSI). (Pet-App. 102–03.)

Under the plea agreement, the State agreed not to recommend a specific term of imprisonment, though it could argue that a prison sentence was called for. (Pet-App. 102.) But at the sentencing hearing, the prosecutor, District Attorney Timothy Gaskell, concluded his remarks by asking the court to impose a sentence of 12 years of initial confinement and 15 years of extended supervision:

> Judge, the only thing I would ask the Court to consider would be 15 years is the maximum time of extended supervision. Maybe keep Mr. Nietzold on extended supervision for a 15-year period rather than the ten that's being requested.
>
> So I guess that's what I would ask that the Court consider, is a 27-year sentence with 12 years of initial confinement and 15 years of extended supervision. That would be a - - depending upon potentially early discharge from prison at some point, that would be about 25 years out that he would be under some formal either incarceration or supervision, which I think just makes some sense in regards to the heinous nature of these crimes. And so that's what I would ask the Court to consider in regards to the sentence.
>
> Thank you.

(Pet-App. 127–28.)

Defense counsel then addressed the court and immediately noted that the prosecutor's request of a specific term of imprisonment violated the plea agreement:

> Thank you, Your Honor.
>
> First of all, going to point out as part of our plea agreement that the [S]tate was not going to make any recommendation with respect to any period of time. And that seems to just happen. He was certainly going to recommend prison. I knew that. He knew that. But he was not to make any specific recommendation.

(Pet-App. 128.)

The prosecutor interjected to admit his mistake and withdraw the recommendation in the following exchange:

> [PROSECUTOR]: And, Judge, now that - - I wish [defense counsel] would have mentioned that. And that's an accurate statement [that the State was not to recommend a specific prison term], Judge. So - -
>
> THE COURT: So you'll make no recommendation separate from that of the PSI.
>
> [PROSECUTOR]: Well, not even that. Just a prison sentence.
>
> THE COURT: Okay. All right.

(Pet-App. 128–29.)

Defense counsel raised no further objection, and proceeded to make the defense's sentencing argument. (Pet-App. 129.)

In passing sentence, the court remarked that "the state" recommended 12 years of initial confinement. (Pet-App. 148.) The prosecutor interrupted to remind the judge, "I didn't make a recommendation," and the court clarified, "I meant DOC by the state, not you." (Pet-App. 148.) The court added:

"Department of Corrections. Thank you for clarifying that. I would not want the record to state that, because I did not listen to what you were saying, essentially [you] were echoing what the PSI said." (Pet-App. 148.)

The court subsequently imposed a sentence of 25 years of imprisonment, consisting of 15 years of confinement and 10 years of extended supervision. (Pet-App. 149–50.) The court explained that it arrived at 15 years of confinement to punish Nietzold for each of the 15 years in which he sexually assaulted the victim. (Pet-App. 149–50.)

By counsel, Nietzold filed a Wis. Stat. § (Rule) 809.30 motion requesting resentencing for the State's initial breach of the plea agreement. (Pet-App. 105.) The circuit court denied the motion without a hearing. (Pet-App. 105, 152.)

On appeal, Nietzold argued that the prosecutor's initial statement recommending a specific term of imprisonment was a "material and substantial" breach of the plea agreement and thus required resentencing, citing *Smith*, 207 Wis. 2d 258. (Nietzold's Br. 9–10, 13–14.) In response, the State argued that because the recommendation was inadvertent and the prosecutor immediately withdrew it once he realized his mistake, the initial breach was not "material and substantial." (State's Br. 9–11.) These facts distinguished Nietzold's case from *Smith*, where no objection was raised and the erroneous recommendation went uncorrected. (State's Br. 10–11.)

In an opinion authored by Judge JoAnne Kloppenburg not recommended for publication, the court of appeals reversed and remanded for resentencing. (Pet-App. 101.) The court concluded that it was "self-evident" that the prosecutor's initial recommendation of a specific sentence was a "material" breach. (Pet-App. 107.) The breach was also "substantial," the court continued, because "the prosecutor's conduct deprived Nietzold of the benefit of the plea agreement based on his

expectation that the prosecutor would not make a specific sentencing recommendation." (Pet-App. 107.)

The court dismissed the State's efforts to distinguish *Smith* on the ground that the initial breach was objected-to and corrected. The court read *Smith* to require resentencing even when a breach is objected-to and remedied:

> [T]he controlling statement of law in *Smith*—that the prosecutor's making a specific sentencing recommendation contrary to the plea agreement was a material and substantial breach of the agreement—depended only on the premise that "the State's recommendation deprived [the defendant] of the benefit for which he negotiated." *Smith*, 207 Wis. 2d 258, ¶ 21.

(Pet-App. 108.)

The court also dismissed as unsupported by legal authority the State's argument that, when defense counsel objects to a recommendation that violates the plea agreement, and the prosecutor then withdraws the erroneous recommendation, there is no "material and substantial" breach requiring resentencing. (Pet-App. 108.)

Because the court disposed of the State's argument in this manner, it did not explain why an initial, inadvertent breach like District Attorney Gaskell's cannot be remedied at the sentencing hearing when, as here, defense counsel makes a timely objection and the prosecutor withdraws the mistaken recommendation. (Pet-App. 108.)

The State requests review of the court of appeals decision.

ARGUMENT

This Court should grant review because the court of appeals judge-authored opinion is contrary to *Smith*, *Knox*, and *Bowers*, and will cause unnecessary confusion because it is citable in Wisconsin courts.

A. Under *Smith*, defense counsel renders ineffective assistance by failing to object at sentencing when the State breaches the plea agreement to recommend a specific term of imprisonment.

In *Smith*, this Court addressed a claim that trial counsel rendered ineffective assistance by not objecting at sentencing to the prosecutor's recommendation of a specific term of imprisonment where the State had promised not to make such a recommendation in securing Smith's guilty plea. 207 Wis. 2d at 262–63, 267–69. The breach was undisputed, as was trial counsel's deficiency in failing to object. *Id.* at 274–75. The issue was whether counsel's deficiency was prejudicial. *Id.* at 275–82. The State argued that it may not have been where the court ultimately did not impose the State's recommended sentence and did not mention its recommendation in passing sentence. *Id.* at 263, 269–71. The State requested a remand for an evidentiary hearing to determine whether there was a reasonable probability of a different outcome had counsel raised a timely objection. *Id.* at 269–71.

Denying the State's request, the Court concluded that "automatic[ ] prejudice[e]" resulted from the prosecutor's material and substantial breach of the plea agreement and defense counsel's failure to object to the breach. *Smith*, 207 Wis. 2d at 282. The court explained: "[W]e conclude that when a prosecutor agrees to make no sentence recommendation but instead recommends a significant prison term, such conduct is a material and substantial breach of the plea agreement."

Id. at 281. "Such a breach of the State's agreement on sentencing is a 'manifest injustice' and always results in prejudice to the defendant." *Id.* "Our conclusion precludes any need to consider what the sentencing judge would have done if the defense counsel had objected to the breach by the district attorney." *Id.* The Court continued: "[T]he prejudice in this case arose when the prosecutor recommended a significant prison term after an agreement to make no recommendation, and Smith's defense counsel failed to object to that recommendation." *Id.* at 282.

The Court thus ordered the case remanded to the circuit court for resentencing. *Smith*, 207 Wis. 2d at 282.

B. *Smith*, *Knox*, and *Bowers* indicate that a prosecutor's initial sentencing recommendation that breaches the plea agreement may be remedied at the sentencing hearing.

A clear premise of *Smith*, if not an express holding, is that when a prosecutor makes an initial sentencing recommendation that breaches the plea agreement, the breach may be remedied at the hearing. *Smith*, 207 Wis. 2d at 282. As noted, prejudice occurred in *Smith* when the prosecutor asked the court to impose a specific sentence after agreeing to make no recommendation, "and Smith's defense counsel failed to object to that recommendation." *Id.* Had counsel made a timely objection, presumably things might have been different—the prosecutor's mistaken recommendation might have been caught and corrected at the hearing. The Court in *Smith* acknowledged the fact that errors of this kind may be cured at sentencing by observing that the prosecutor's "material and substantial" breach of the plea agreement in that case "*was not remedied*, because Smith's counsel failed to object to the breach." *Id.* at 273 (emphasis added).

This basic premise of *Smith*—that an initial, erroneous recommendation may be remedied at sentencing—is a holding of the court of appeals' published decisions in *Knox* and *Bowers*. In *Knox*, the prosecutor initially asked the sentencing court to impose consecutive sentences, contrary to the State's promise to recommend concurrent sentences. 213 Wis. 2d at 320–21. The court of appeals concluded that "[t]he perceived breach in this case was not substantial" because the initial deviation from the agreed upon recommendation "drew a prompt objection and was shown to be the result of a mistake that was quickly acknowledged and rectified." *Id.* at 322–23. The prosecutor's initial error was "momentary and inadvertent," it was corrected, and the prosecutor "earnest[ly]" advocated for the bargained-for recommendation. *Id.*

Likewise, the court in *Bowers* relied on *Knox* in concluding that an initial sentencing recommendation that exceeded the promised recommendation was not a "material and substantial" violation where defense counsel objected and the prosecutor corrected the misstated recommendation. *Bowers*, 280 Wis. 2d 534, ¶ 12. Further, the court clarified that "[w]hile the State did not correct itself with [as much] enthusiasm and zeal" as the *Knox* prosecutor, "the State's 'earnest' advocacy of the proper sentence . . . is not required for us to find a perceived breach immaterial and insubstantial." *Id.* "*Knox* teaches us that it is sufficient for the State to promptly acknowledge the mistake of fact and to rectify the error without impairing the integrity of the sentencing process." *Id.* Accordingly, the court concluded that the prosecutor's initial breach was "rectified" at the hearing and thus was no "material and substantial breach" of the plea agreement, and Bowers was not entitled to resentencing. *Id.* ¶ 13.

The State now applies these principles to the facts of Nietzold's case.

C. Because the prosecutor's initial, mistaken recommendation was objected-to and remedied at the hearing, there was no "material and substantial" breach justifying resentencing under the cases discussed above.

The court of appeals' opinion in this case misapprehends, and is contrary to, the leading case in this area, *Smith*.

As noted, *Smith* addressed a claim of trial counsel ineffectiveness for not objecting to the prosecutor's breach of the plea agreement for recommending a specific term of imprisonment. *Smith*, 207 Wis. 2d at 262–63, 267–69. Counsel was ineffective for not making such an objection, and counsel's oversight was automatically prejudicial because the breach was "material and substantial" *and* "was not remedied, because Smith's counsel failed to object to [it]." *Id.* at 273.

The *Smith* court *did not* hold that an initial recommendation that breached the plea agreement but was objected-to and ostensibly remedied at sentencing would also be a "material and substantial" breach requiring resentencing. Thus, without declaring so, the court of appeals effectively extended *Smith* to hold that even an objected-to and corrected initial breach is "material and substantial," requiring resentencing. (Pet-App. 106–09.) Such an error, the court effectively held, cannot be cured at the sentencing hearing; a new sentencing hearing is automatic, no matter whether the error is caught and addressed at the time. (Pet-App. 106–09.)

But, as shown above, *Smith* all but holds that a prosecutor's initial mistake of this kind can be remedied at the sentencing hearing. *Smith* presumes that a sentencing recommendation that is inconsistent with the plea agreement may be remedied by defense counsel raising a timely

objection, and the prosecutor withdrawing the faulty recommendation. *See Smith*, 207 Wis. 2d at 273, 282.

If a breach of this kind could not be remedied by a timely objection and the prosecutor's change of course, then, obviously, trial counsel could not be ineffective for failing to object to the breach. There would be no point in making such an objection; the prosecutor's error could not be cured at the sentencing hearing, and resentencing would be mandated regardless of whether a timely objection was raised. And, of course, *Smith*'s conclusion that trial counsel is ineffective for not raising a timely objection would be incorrect.

The court of appeals did not explain why a prosecutor's sentencing recommendation that breaches the plea agreement is the sort of error that cannot be remedied at the sentencing hearing. But it appears that the court was skeptical of sentencing courts' ability to set aside improper information. In its remand order, the court of appeals ordered that the new sentencing hearing not be held before the original sentencing judge. (Pet-App. 102.) Additionally, the court omitted any reference in its opinion to the prosecutor's initial, specific sentencing recommendation "to avoid compounding the State's error for purposes of the resentencing that will follow remand before a circuit court judge different from the original sentencing judge." (Pet-App. 102 n.1.)

As argued in the court of appeals, the State believes that this gives sentencing courts far too little credit. Even jurors, less sophisticated actors, are presumed to follow curative instructions when exposed to improper evidence or argument at trial. *See State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983). At the very least, judges should be presumed to be able to set aside a prosecutor's initial, withdrawn sentencing recommendation. In *Smith*, this Court simply remanded without specifying that the new

sentencing hearing be held before a different judge. *Smith*, 207 Wis. 2d at 282.

Further, the court of appeals decision ignores an important fact: Once the prosecutor withdrew the erroneous recommendation, trial counsel raised no further objection. Counsel's initial objection was sufficient to alert the prosecutor to his error, and the prosecutor rectified it. Counsel did not object a *second* time to insist on resentencing despite the prosecutor's correction. Properly viewed, Nietzold's resentencing claim is therefore unpreserved and forfeited, and Nietzold has never argued that trial counsel was ineffective for failing to make a *second* objection to demand resentencing.[1]

Finally, the court of appeals' decision, unlike *Smith*, does not serve the interest of judicial economy. *Smith* presumes that a prosecutor's initial, mistaken recommendation can be remedied, and that trial judges are able to set aside the erroneous recommendation. *Nietzold* requires the court to convene a new sentencing hearing even when a prosecutor's initial, faulty recommendation is objected-to and ostensibly remedied.

In sum, the court of appeals' decision should be reversed because it represents an unwitting and illogical extension of *Smith*. As noted, the parties briefed *Smith* in the court of appeals. To repeat, the State argued there that DA Gaskell's initial recommendation did not require resentencing because, unlike in *Smith*, the district attorney's faulty recommendation was objected to and withdrawn; thus, there

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[1] Nietzold argued in the alterative that trial counsel was ineffective for "waiv[ing] the breach." (Nietzold's Br. 13.) But, as the State asserted in the court of appeals, counsel did not waive the breach. He timely objected to it, and the prosecutor appropriately remedied it by withdrawing the erroneous recommendation. (State's Br. 12.)

was no "material and substantial" breach. (State's Br. 9–11.) But the court's decision is also contrary to *Knox* and *Bowers*, two court of appeals' cases that were overlooked by the parties and the court. Undersigned counsel acknowledges that he should have also identified and discussed *Knox* and *Bowers* in the court of appeals.

These two cases further illustrate that the court of appeals' decision is contrary to established case law. In both, the prosecutor made an initial sentencing recommendation that violated the plea agreement—one mistakenly recommended consecutive sentences (*Knox*), the other sought a sentence that was longer than the sentence the State agreed to recommend (*Bowers*). *Knox*, 213 Wis. 2d at 320–21; *Bowers*, 280 Wis. 2d 534, ¶ 12. These initial recommendations, though contrary to the plea agreements, were ultimately not substantial breaches because defense counsel objected, and the prosecutors corrected the errors. *See Knox*, 213 Wis. 2d at 322–23; *Bowers,* 280 Wis. 2d 534, ¶ 12.

Though the particular breach in this case (recommending a specific sentence when the State promised not to make a specific recommendation) was not identical to the breaches in *Bowers* and *Knox*, the principle set forth in those cases should apply: When "the State . . . promptly acknowledge[s] the mistake of fact" at the sentencing hearing, it may "rectify the error without impairing the integrity of the sentencing process." *Bowers*, 280 Wis. 2d 534, ¶ 12 (discussing *Knox*, 213 Wis. 2d at 322–23).

That is exactly what happened here. Upon recognizing his mistake, the prosecutor withdrew the initial recommendation and stated the agreed upon recommendation of prison with the specific term to be left up to the court. (Pet-App. 104, 128–29.) Later, when the court described the PSI author's recommendation as "the state's" recommendation, the prosecutor interrupted to ensure that the court

understood the State's position: prison, with no specific recommendation as to the term of imprisonment.

The court of appeals opinion is contrary to established law, and therefore should be reversed.

D. Reversal is necessary because the court of appeals' legally incorrect opinion is citable in Wisconsin courts and is therefore likely to cause confusion.

As shown, the opinion in this case is at odds with controlling case law. This, by itself, is reason to grant review and reverse. *See* Wis. Stat. § (Rule) 809.62(1r)(d). But the opinion in this case is judge-authored and therefore citable in Wisconsin courts. Wis. Stat. § (Rule) 809.23(3)(c). Therefore, the most pressing reason to take review is to prevent the needless confusion that is likely to result from parties and courts citing this opinion and attempting to reconcile it with existing case law. Wis. Stat. § (Rule) 809.62(1r)(c).

While only "persuasive" authority, parties are likely to cite *Nietzold* for the incorrect proposition that when the prosecutor makes an initial, mistaken sentencing recommendation but corrects the error at the hearing, resentencing is nonetheless required. Parties are also likely to cite *Nietzold* for its misreading of the *Smith* decision. A busy trial court may well accept a party's argument that *Smith* requires automatic resentencing even when a mistaken sentencing recommendation is remedied, based on *Nietzold*'s holding and its reading of *Smith*.

Or a party might seek to reconcile *Nietzold* with *Smith*, *Knox*, and *Bowers* by arguing the cases demonstrate that certain kinds of erroneous sentencing recommendations may be remedied while others may not. *Knox* and *Bowers*, the argument would go, provide that a mistaken request for consecutive sentences (*Knox*) or a request for a longer sentence than the State promised to recommend (*Bowers*)

may be remedied at the sentencing hearing. But *Nietzold*, and *Nietzold*'s (mis-)reading of *Smith*, show that a mistaken recommendation of a specific term of imprisonment cannot be corrected at the hearing and always results in automatic resentencing. Of course, this attempt at reconciling *Nietzold* with existing case law makes little sense, as no rationale would appear to exist for treating these very similar sentencing breaches differently.

The court of appeals decision in *Nietzold* is therefore likely to confuse courts and litigants and is contrary to *Smith*, *Knox*, and *Bowers*. Review is warranted.

CONCLUSION

For these reasons, this Court should grant this petition and reverse the decision of the court of appeals.

Dated this 10th day of January 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 3,997 words.

Dated this 10th day of January 2022.

_____
JACOB J. WITTWER
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 10th day of January 2022.

_____
JACOB J. WITTWER
Assistant Attorney General

Appendix
State of Wisconsin v. Robert K. Nietzold, Sr.
Case No. 2021AP21-CR

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APPENDIX CERTIFICATION

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

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

Dated this 10th day of January 2022.

_____

JACOB J. WITTWER
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 10th day of January 2022.

_____
JACOB J. WITTWER
Assistant Attorney General