STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP21-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ROBERT K. NIETZOLD, SR.,

Defendant-Appellant.

REVIEW OF A DECISION AND ORDER OF THE COURT OF APPEALS, DISTRICT IV, REVERSING A JUDGMENT AND ORDER OF VERNON COUNTY CIRCUIT COURT, THE HONORABLE DARCY JO ROOD, PRESIDING, AND REMANDING FOR RESENTENCING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUE PRESENTED

At Defendant-Appellant Robert K. Nietzold, Sr.'s sentencing hearing, the prosecutor breached the plea agreement by recommending a specific term of imprisonment. But defense counsel objected, and the prosecutor, realizing his mistake, withdrew the initial recommendation and made the one promised in the plea agreement, imprisonment with the term left to the court. Once the prosecutor corrected his error, defense counsel raised no further objection, and the court proceeded to impose sentence.

On appeal, Nietzold, by counsel, argued that he was entitled to resentencing for the prosecutor's initial breach of the plea agreement. The court of appeals agreed, reversing and remanding for resentencing.

Did defense counsel's timely objection and the prosecutor's withdrawal of his erroneous recommendation and subsequent advocacy for the promised recommendation remedy the initial breach of the plea agreement?

The court of appeals answered no.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both are requested. This Court ordinarily holds argument in its cases and publishes its decisions.

INTRODUCTION

In *Smith*,[1] this Court concluded that, when a prosecutor makes a sentencing recommendation that violates the plea agreement, and defense counsel fails to object to the mistake, the defendant is entitled to relief for the prosecutor's breach. But *Smith* indicated that such a breach may be remedied at the sentencing hearing. This proposition was confirmed in two decisions of the court of appeals, *Knox* and *Bowers*.[2]

Here, the State mistakenly recommended a specific term of imprisonment in breach of the plea agreement. But defense counsel objected, and the prosecutor immediately withdrew the mistaken recommendation and advocated for the promised recommendation. The court of appeals reversed and remanded for resentencing, holding that a prosecutor's initial, mistaken breach of a plea agreement cannot be remedied by the prosecutor's "after-the-fact" statement of the promised sentencing recommendation.

The court of appeals' decision is contrary to *Smith* (and *Knox* and *Bowers*). A prosecutor's initial breach of a plea agreement may be remedied at the sentencing hearing, and the breach in this case was, indeed, remedied. The decision of the court of appeals should be reversed.

STATEMENT OF THE CASE

In 2018, Robert Nietzold's adult daughter reported to law enforcement that Nietzold sexually assaulted her throughout her childhood, starting when she was four. (R. 2:2–4.) Nietzold confessed to multiple assaults against the

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[1] *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997).

[2] *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).

victim, and he was charged with five counts of sexual assault of a child under the age of 16, contrary to Wis. Stat. § 948.02(2). (R. 2:1–4.)

Pursuant to a plea agreement, Nietzold pleaded no contest to one count of repeated sexual abuse of a child, contrary to Wis. Stat. § 948.025(1), charged in an amended information. (R. 16:1; 17:1–2.) The court accepted the plea at a hearing and found Nietzold guilty, and the case proceeded to sentencing. (R. 55:8–10.)

Under the plea agreement, the State promised to request a sentence of imprisonment without recommending a specific term. (R. 17:2; 55:3.) But at the June 2019 sentencing hearing, the prosecutor appeared to forget this commitment. (R. 54:16–17, Pet-App. 29–30.) The prosecutor noted the presentence investigator's recommendation—12 years of initial confinement and 10 years of extended supervision—and the maximum term of imprisonment provided by statute, 25 years of initial confinement and 15 years of extended supervision. (R. 54:15–16, Pet-App. 28–29.) The prosecutor then asked 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 [c]ourt 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 [c]ourt 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 regard to the heinous nature of these crimes. And so that's what I would ask the [c]ourt to consider in regards to the sentence.

> Thank you.

(R. 54:16–17, Pet-App. 29–30.)

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

> First of all, going to point out as part of our plea agreement that the State 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.

(R. 54:17, Pet-App. 30.)

The prosecutor interjected to admit his mistake, withdraw the recommendation, and substitute the promised request of imprisonment with the term to be determined by the court:

> [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.

(R. 54:17–18, Pet-App. 30–31.)

In passing sentence, the court remarked that "[t]he [S]tate" recommended 12 years of initial confinement. (R. 54:37, Pet-App. 50.) The prosecutor then interrupted to remind the Judge "I didn't make a recommendation," and the court clarified, "I meant DOC by the state, not you." (R. 54:37, Pet-App. 50.) 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." (R. 54:37, Pet-App. 50.) The prosecutor then reiterated his promise not to recommend a specific term of imprisonment, and the court said it understood:

> THE COURT: Other than asking for a longer extended supervision, but you didn't ask for any more - -
>
> [THE PROSECUTOR]: Right, but, Judge - -
>
> THE COURT: - - confinement - -
>
> [THE PROSECUTOR]: The negotiation - -
>
> THE COURT: I understand.
>
> [THE PROSECUTOR]: I was not to make any recommendation.
>
> THE COURT: And you withdrew your recommendation.
>
> [THE PROSECUTOR]: Yeah.
>
> THE COURT: I get that. I'm just saying it was DOC. It was DOC that made this recommendation.
>
> [THE PROSECUTOR]: Right.

(R. 54:37–38, Pet-App. 50–51.)

The court subsequently imposed a sentence of 25 years of imprisonment, consisting of 15 years of confinement and 10 years of extended supervision. (R. 54:38–39, Pet-App. 51–52.) 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. (R. 2:2–3; 54:38–39, Pet-App. 51–52.)

In December 2020, Nietzold, by counsel, filed a Wis. Stat. § (Rule) 809.30 motion requesting resentencing before another court for the State's breach of the plea agreement. (R.

37:1.) The circuit court summarily denied the motion without an evidentiary hearing in a hand-written order issued December 10, 2020, and a printed, one-sentence order issued February 8, 2021. (R. 39:1, Pet-App. 54; 45:1, Pet-App. 55.)

Nietzold appealed. The court of appeals, District IV, reversed, concluding that the prosecutor's initial recommendation of a specific sentence constituted a material and substantial breach of the plea agreement. *State v. Robert K. Nietzold, Sr.*, No. 2021AP21-CR, 2021 WL 5829889 (Wis. Ct. App. Dec. 9, 2021) (unpublished). (Pet-App. 1–11.)

In a citable opinion authored by Judge JoAnne F. Kloppenburg, the court concluded that it was "self-evident" that the prosecutor's initial recommendation of a specific sentence was a material breach. (Pet-App. 7.) 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. 7.)

The court read this Court's decision in *Smith* to require resentencing even when defense counsel makes a timely objection to the prosecutor's breach, and the prosecutor remedies the breach by withdrawing the erroneous recommendation:

> [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. 8–9.)

The State had argued that Nietzold's case was distinguishable from *Smith* because here, unlike in *Smith*,

the prosecutor's breach was caught and remedied. (Pet-App. 8.) The State argued that, once Nietzold's lawyer objected and the prosecutor withdrew the erroneous recommendation, the breach was no longer material and substantial. (Pet-App. 8.) The court rejected this argument as legally unsupported, noting that the State did not cite case law in support of its position. (Pet-App. 8.) The court also reiterated that the State's position was contrary to *Smith*.

The State petitioned for review. The State argued that the court of appeals misread *Smith*, which expressly recognizes that a prosecutor's sentencing recommendation that breaches the plea agreement may be "remedied" at the sentencing hearing. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In the interest of candor, the State also acknowledged in its petition that it had overlooked *State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255, and *State v. Knox*, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997), in the court of appeals, two additional cases holding that a prosecutor's breach of the plea agreement at sentencing may be remedied. This Court granted review.

ARGUMENT

Nietzold is not entitled to resentencing for the prosecutor's initial breach of the plea agreement because the breach was caught and remedied at the sentencing hearing.

A. Standard of review

A claim that the State breached the plea agreement is considered under a mixed standard of review. *State v. Williams*, 2002 WI 1, ¶ 20, 249 Wis. 2d 492, 637 N.W.2d 733. The circuit court's findings of historical fact are reviewed for clear error. *Id.* But whether a breach occurred, and, if so, whether it deprived the defendant of a material or substantial

benefit for which he or she has bargained, are questions of law that are reviewed *de novo*. *See id.*; *State v. Quarzenski*, 2007 WI App 212, ¶ 19, 305 Wis. 2d 525, 739 N.W.2d 844.

B. To warrant relief, a prosecutor's breach of the plea agreement must deprive the defendant of a material and substantial benefit of the agreement.

"A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." *Smith*, 207 Wis. 2d at 271. "[O]nce an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights demand fulfillment of the bargain." *Williams*, 249 Wis. 2d 492, ¶ 37.

A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. *Smith*, 207 Wis. 2d at 271. Even a subtle suggestion that the prosecutor has reservations about the agreed upon recommendation may "taint" the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for. *State v. Poole*, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986).

But to be actionable, "[a] breach must not merely be technical." *State v. Bangert*, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). "[R]ather, [it] must deprive the [defendant] of a *substantial and material benefit* for which he [or she] bargained." *Id.* (emphasis added). If the breach is material and substantial, a defendant may be entitled to resentencing or plea withdrawal, as the sentencing court, in its discretion, deems appropriate. *See State v. Howard*, 2001 WI App 137, ¶¶ 36–37, 246 Wis. 2d 475, 630 N.W.2d 244.

"When examining a defendant's allegation that the State breached a plea agreement, such as by making a different recommendation at sentencing, it is irrelevant

whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation." *Howard*, 246 Wis. 2d 475, ¶ 14. Accordingly, a court examining a plea-breach claim focuses on whether the breach was material and substantial, not on whether the sentencing court was influenced by the breach. *Id.*

C. Under *Smith*, a defendant is entitled to relief when the prosecutor breaches the plea agreement by not making the promised sentencing recommendation, *and* defense counsel fails to object to the breach.

When no objection is made to a prosecutor's breach of the plea agreement at sentencing, the defendant forfeits the right to challenge the breach directly. *Howard*, 246 Wis. 2d 475, ¶ 12. The claim must therefore be raised as ineffective assistance of counsel. *Id.*

In *Smith*, this Court addressed a claim that counsel rendered ineffective assistance by not objecting when, in breach of the plea agreement, the prosecutor recommended a specific term of imprisonment. 207 Wis. 2d at 262–63, 267–69. The State did not dispute that the breach was material and substantial, and the court agreed: "[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. Counsel's failure to object was therefore deficient performance.[3] *See id.* at 274–75, 281.

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[3] The Court acknowledged that there may be some circumstances in which defense counsel has a strategic reason not to object to a prosecutor's breach of the plea agreement. *Smith*, 207 Wis. 2d at 281 n.13. But it was undisputed that counsel's non-objection was not a strategic choice in Smith's case. *Id.* at 274–75 & n.11.

The disputed issue was whether the failure to object was also prejudicial where the court did not adopt the State's recommendation in imposing sentence. *Id.* at 275. This Court held that, when counsel fails to object to a breach of the agreement at sentencing, prejudice is presumed: "Such a breach of the State's agreement on sentencing is a 'manifest injustice' and always results in prejudice to the defendant." *Id.* at 281. Accordingly, the Court rejected the idea of a retrospective hearing "to consider what the sentencing judge would have done if the defense counsel had objected to the breach by the district attorney." *Id.* "[W]hen a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor," the court explained, "such promise must be fulfilled." *Id.* The Court therefore remanded for a new sentencing hearing. *Id.* at 282.

D. When, as here, counsel timely objects to the prosecutor's initial breach, and the prosecutor replaces the mistaken recommendation with the promised one, the breach is remedied and relief is not warranted.

Because Smith's attorney did not make a timely objection, *Smith* does not squarely address how courts should address a claim like Nietzold's—a claim that the prosecutor's breach of the plea agreement warrants relief even though trial counsel made a timely objection to the breach, and the prosecutor subsequently replaced the mistaken sentencing recommendation with the promised one.

But *Smith* indicates that a timely objection allows the opportunity for the breach to be "remedied" at the hearing. *Smith*, 207 Wis. 2d at 272–73. After concluding that the breach in Smith's case was "material and substantial," the court added: "Further, the breach was not *remedied*, because Smith's counsel failed to object to the breach." *Id.* (emphasis

added). Later, the court suggested once again that a timely objection would have allowed the breach to be remedied: "[P]rejudice in this case arose when the prosecutor" made a recommendation that breached the plea agreement, "and Smith's defense counsel failed to object to that recommendation." *Id.* at 282.

Indeed, if a plea breach of this kind could not be remedied at the hearing, there would be little point in requiring an unobjected-to breach to be raised as ineffective assistance of counsel. Whether objected-to or not, the outcome of the breach would always be the same: automatic resentencing or plea withdrawal. *See Howard*, 246 Wis. 2d 475, ¶¶ 36–37.

Thus, *Smith* leaves little doubt that a prosecutor's sentencing recommendation in breach of a plea agreement may be "remedied" if it is caught at sentencing and the mistaken recommendation is withdrawn by the prosecutor. *See Smith*, 207 Wis. 2d at 272–73, 282. Two subsequent decisions of the court of appeals confirm that a prosecutor's initial breach of the plea agreement may be remedied at the sentencing hearing.

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. But 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.* The breach did not require relief because

it was corrected and was therefore no longer "substantial." *See id.* at 322–23.

In *Bowers*, the court of appeals 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 there was no "material and substantial breach" of the plea agreement, and Bowers was not entitled to relief for the initial, corrected breach. *Id.* ¶ 13.

Smith, *Knox*, and *Bowers* thus establish that a prosecutor's initial breach of the plea agreement may be remedied at the sentencing hearing. *Smith*, 207 Wis. 2d at 272–73, 282; *Bowers*, 280 Wis. 2d 534, ¶¶ 12–13; *Knox*, 213 Wis. 2d at 322–23. When defense counsel timely objects to the prosecutor's breach at the hearing, and the prosecutor replaces the mistaken recommendation with the promised one, the initial breach is no longer material and substantial, and it is therefore not actionable. *Id.*

Under *Smith*, *Knox*, and *Bowers*, Nietzold is not entitled to relief for the prosecutor's initial breach of the plea agreement of not making the promised sentencing recommendation. The breach was remedied at the hearing by defense counsel's timely objection, and by the prosecutor's

replacement of the mistaken recommendation (12 years of initial confinement and 15 years of extended supervision) with the promised recommendation (imprisonment with the term left to the court). (R. 54:16–18, Pet-App. 29–31.)

The prosecutor immediately withdrew the mistaken recommendation once defense counsel objected, and he then substituted the promised recommendation of imprisonment without a specified term. (R. 54:17–18, Pet-App. 30–31.) Later, when the court imprecisely referred to the PSI writer's sentence recommendation as "[t]he [S]tate['s]" recommendation, the district attorney interrupted to correct the court. (R. 54:37–38, Pet-App. 50–51.) He reiterated that the State was recommending a sentence of imprisonment without taking a position on the specific term. (R. 54:37–38, Pet-App. 50–51.) The court indicated that it understood. (R. 54:37–38, Pet-App. 50–51.)

The court of appeals misread *Smith* to require relief even when the prosecutor's initial breach of the plea agreement is caught at the hearing and the prosecutor remedies it. (Pet-App. 8–9.) But, as shown, *Smith* does not so hold. In fact, it suggests just the opposite: that a timely objection—like the one made by Nietzold's attorney—allows for the opportunity to "remedy" the initial breach.

The court of appeals dismissed the prosecutor's repeated advocacy for the promised recommendation after withdrawing the mistaken recommendation as "after-the-fact . . . statement[s]." (Pet-App. 8.) The court did not mention the prosecutor's specific recommendation and ordered that Nietzold be resentenced before a different judge. (Pet-App. 2.) It is not clear why the court believed that this particular error could not be remedied. Courts often must set aside irrelevant or prejudicial information in passing sentence. Even jurors—far less sophisticated actors than judges—are presumed to follow cautionary or limiting instructions when exposed to

inadmissible evidence. *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998). As *Smith*, *Knox*, and *Bowers* indicate, sentencing courts are entitled to at least as much respect regarding their ability to disregard a mistaken-but-remediable sentencing recommendation.

This case is plainly distinguishable from *Williams*, where this Court concluded that the prosecutor's efforts to remedy a breach of the plea agreement at sentencing were "too little, too late." *Williams*, 249 Wis. 2d 492, ¶ 52. There, the State agreed to recommend a sentence of three years of probation with 60 days in the county jail in exchange for Williams's guilty plea to failure to pay child support. *Id.* ¶ 24. The court ordered a PSI report, and the PSI writer recommended "a medium term of imprisonment." *Id.* ¶ 25.

The PSI writer did not appear at the hearing. *Williams*, 249 Wis. 2d 492, ¶ 26. In the PSI writer's stead, the prosecutor described at great length the PSI writer's very negative assessment of Williams, and the prosecutor's remarks made clear that the State had come to share this assessment. *Id.* ¶ 26. Then the prosecutor reiterated on the PSI writer's behalf the writer's recommendation of a term of imprisonment. *Id.* When defense counsel objected to these remarks, the prosecutor explained that the State was not changing its recommendation of three years of probation with 60 days of jail time; it was "just merely relaying" the PSI writer's recommendation so that the sentencing court could "have all the information necessary." *Id.* ¶ 29. The court sentenced Williams to 18 months in prison. *Id.* ¶ 25.

This Court concluded that the prosecutor's remarks about the PSI report and the writer's recommendation of imprisonment, taken as a whole, "undercut the defendant's plea agreement, resulting in a material and substantial breach of the defendant's plea agreement." *Id.* ¶ 59.

Unlike the present case, the breach in *Williams* was substantial and material because it was systemic and woven into the State's full sentencing remarks. The State essentially adopted the PSI writer's view of the case and then conveyed the writer's recommended sentence, which was much harsher than the State's promised recommendation. *Williams*, 249 Wis. 2d 492, ¶ 26. Here, the prosecutor's breach was discrete—a mistaken recommendation of a specific sentence—and could be (and was) much more easily rectified than the prosecutor's more systemic breach in *Williams*. (R. 54:17–18, Pet-App. 30–31.)

Further, the prosecutor's stated efforts to rectify the breach in *Williams* truly were "too little." *Williams*, 249 Wis. 2d 492, ¶ 52. Unlike the present case, the prosecutor did not disavow the initial breach. Rather, the prosecutor in *Williams* argued that there was no breach. *Id.* ¶ 29. The State explained that it was merely "relaying" the PSI writer's views so the court would "have all the information necessary"—even though the court already had the information because the PSI was before the court. *Id.*

Based on the foregoing, this Court should conclude that the prosecutor's initial breach of the plea agreement was remedied where defense counsel objected and the prosecutor replaced the mistaken recommendation with the promised one. Because the initial breach was remedied, it was not substantial and material, and thus Nietzold is not entitled to resentencing.

CONCLUSION

The decision of the court of appeals should be reversed, and the sentence should be reinstated.

Dated this 9th day of June 2022.

Respectfully submitted,

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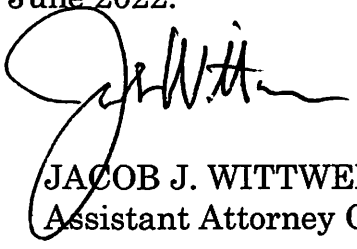
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,909 words.

Dated this 9th day of June 2022.



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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. § (Rule) 809.19(12) (2019-20).

I further certify that:

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

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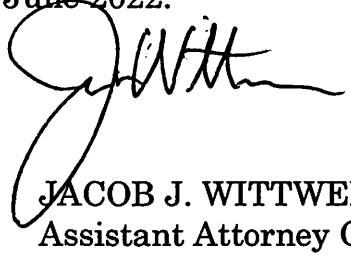
Dated this 9th day of June 2022.



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