STATE OF WISCONSIN

IN SUPREME COURT

No. 2024AP2368-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

SAMUEL R. OSORNIO,

Defendant-Appellant.

PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
michael.conway@wisdoj.gov

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INTRODUCTION

A jury found Samuel R. Osornio guilty of reckless homicide by heroin delivery and of delivering the heroin that caused the victim's death. Although the heroin delivery was a lesser-included offense of the homicide offense, no one noticed before the jury began deliberating. Three hours into deliberations, the jury sent its first note, stating that it had agreed on heroin delivery but still disagreed on the homicide. The trial court instructed the jury to continue deliberating. Later during deliberations, Osornio noticed the lesser-included offense and raised it. The trial court ultimately gave the jury a modified lesser-included offense instruction. One hour after receiving the modified lesser-included offense instruction, the jury issued its verdict.

In postconviction proceedings, Osornio argued that his trial counsel was ineffective for not requesting the lesser-included offense before the jury began deliberating. The trial court denied the claim for lack of prejudice. The court of appeals reversed in an opinion recommended for publication. (Pet-App. 3–34.)

The court of appeals made two legal errors in assessing prejudice. First, it required the State to disprove prejudice instead of requiring Osornio to prove prejudice. Second, it reduced a "reasonable probability" standard to anything more than "conceivable." These errors conflict with controlling U.S. Supreme Court precedent and concern a legal standard that is regularly applied statewide. Because the opinion is recommended for publication, the decision invites courts to make the same errors in the future. This Court should grant review to correct the error and realign Wisconsin law with U.S. Supreme Court precedent.

ISSUE PRESENTED

Did Osornio prove that trial counsel's failure to request the lesser-included offense instruction before the jury began deliberating created a reasonable probability of a different result at his trial?

Osornio raised this issue in the court of appeals by appealing the circuit court's order denying his postconviction motion. The court of appeals concluded that trial counsel's deficient performance prejudiced Osornio. Because the parties did not dispute that trial counsel's performance was deficient, the court of appeals reversed the order denying the postconviction motion and remanded for a new trial. (Pet-App. 33.)

THE CASE FOR REVIEW

Claims regarding the prejudice prong of the ineffective assistance of counsel standard do not usually merit this Court's review. This Court does not grant review "merely to correct error or to examine alleged error." *Vollmer v. Luety*, 156 Wis. 2d 1, 14, 456 N.W.2d 797 (1990). This Court accepts cases directed at its "primary function . . . of law defining and law development." *Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997). Cases regarding the prejudice standard usually fall into the former camp.

This case, however, presents the rare prejudice issue with an opportunity for law development. Most prominently, the court of appeals' decision is recommended for publication. Thus, the question is not whether this case will develop the law, but which court will develop it. This Court should take the case and develop the law rather than allow the court of appeals' decision to stand.

This Court's intervention is necessary because the court of appeals' application of prejudice runs contrary to the U.S. Supreme Court's decisions in *Strickland v. Washington*, 466

U.S. 668 (1984), and *Harrington v. Richter*, 562 U.S. 86 (2011). Wis. Stat. § (Rule) 809.62(1r)(d). The errors are aggravated because the court of appeals purported to apply both of those decisions. (Pet-App. 32–33.)

The court of appeals' decision would have a wide impact because criminal defendants frequently raise ineffective assistance of counsel claims in postconviction motions. The court of appeals erred as a matter of law by shifting the burden of proof and diluting the standard. Because the court of appeals erred as a matter of law on a frequently litigated standard, this Court's review would "clarify or harmonize the law" on a "question of law . . . that is likely to recur." Wis. Stat. § (Rule) 809.62(1r)(c)3.

The present case was not the first time in the last few years that the court of appeals dubiously applied *Strickland* prejudice. In *State v. Arrington*, 2021 WI App 32, 398 Wis. 2d 198, 960 N.W.2d 459, the court of appeals concluded that prejudice existed in a scant four paragraphs, *id.* ¶¶ 44–48. This Court subsequently reversed, demonstrating how a court correctly evaluates the totality of the circumstances in considering *Strickland* prejudice. *State v. Arrington*, 2022 WI 53, ¶¶ 74–80, 402 Wis. 2d 675, 976 N.W.2d 453. Following *Arrington*, the court of appeals misapplied *Strickland* prejudice in *State v. Coughlin*, No. 2021AP1416, 2023 WL 2317640 (Wis. Ct. App. Mar. 2, 2023) (per curiam), *review denied*, 2024 WI 3 (Aug. 17, 2023) (unpublished).[1] As in the present case, the court of appeals shifted the burden of proof, concluding that prejudice existed because the State failed to prove that counsel's deficient performance was harmless. *Id.* ¶¶ 74–84.

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[1] Consistent with Wis. Stat. § (Rule) 809.23(3), the State does not cite to *Coughlin* for persuasive authority but to show the arguments made and that the decision exists. *See State v. Smith*, 2018 WI 2, ¶ 28 n.16, 379 Wis. 2d 86, 905 N.W.2d 353.

With this recent history in mind, the present case would serve as a useful lodestar among this Court's precedent clarifying and defining the prejudice standard. In *State v. Sholar*, 2018 WI 53, 381 Wis. 2d 560, 912 N.W.2d 89, this Court "reiterate[d]" that prejudice is less exacting than the sufficiency-of-the-evidence standard and does not require the defendant to prove that he "*would have*" been acquitted. *Id.* ¶¶ 44–46. This case would invert the issue in *Sholar*. While *Sholar* cautioned courts against raising the bar for prejudice, the present case would enable this Court to check lower courts from erroneously lowering the bar. This Court recently issued a decision to this same effect for the deficient performance prong of the ineffective assistance standard. *See State v. Mull*, 2023 WI 26, 406 Wis. 2d 491, 987 N.W.2d 707. The present case provides the same opportunity for prejudice.

Without this Court's intervention, the court of appeals' published decision will play an outsized role in defining *Strickland* prejudice in future cases because this Court has not addressed *Strickland* prejudice as a legal standard since *Sholar*.

This Court has typically opted to resolve ineffective assistance claims on deficient performance, alone. *See State v. Molde*, 2025 WI 21, ¶ 27 n.6, 416 Wis. 2d 262, 21 N.W.3d 343; *Mull*, 406 Wis. 2d 491, ¶ 64; *State v. Hineman*, 2023 WI 1, ¶¶ 48, 51, 53, 405 Wis. 2d 233, 983 N.W.2d 652; *State v. Savage*, 2020 WI 93, ¶ 45, 395 Wis. 2d 1, 951 N.W.2d 838; *State v. Gutierrez*, 2020 WI 52, ¶ 48, 391 Wis. 2d 799, 943 N.W.2d 870; *State v. Pico*, 2018 WI 66, ¶ 39, 382 Wis. 2d 273, 914 N.W.2d 95; *State v. Sanders*, 2018 WI 51, ¶ 54, 381 Wis. 2d 522, 912 N.W.2d 16.

When this Court has addressed prejudice, it has been in reviewing the sufficiency of a defendant's pleadings for a

Machner[2] hearing or in the context of a motion for plea withdrawal. *See State v. Jackson*, 2023 WI 3, ¶ 23, 405 Wis. 2d 458, 983 N.W.2d 608; *State v. Cooper*, 2019 WI 73, ¶¶ 28–32, 387 Wis. 2d 439, 929 N.W.2d 192. This Court applied the *Strickland* prejudice in a trial context only in *Arrington* and in resolving the materiality prong of a *Brady*[3] claim in *Hineman*, 405 Wis. 2d 233, ¶¶ 31, 37. Neither case necessitated clarifying *Strickland* prejudice as a legal standard.

This Court should grant review to prevent the court of appeals' erroneous published decision from filling this recent vacuum in precedent on *Strickland* prejudice. Not only does this case present an opportunity for law development, but it is also the right time for this Court to clarify and apply *Strickland* prejudice.

BACKGROUND

A. The Trial Evidence

The victim, A.B.,[4] died in his bed from acute intoxication due to a combination of heroin and alcohol. (R. 127:18–19, 23.) Police found a foil wrapper with heroin residue on his nightstand and a bottle of vodka on the floor. (R. 128:109, 113.) A.B. had a blood alcohol content of 0.197 at his death. (R. 127:20, 22.)

A.B.'s cell phone revealed that he communicated with Osornio to acquire drugs. (R. 128:170–72.) Osornio subsequently admitted to police that he sold drugs to A.B. in

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

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

[4] The State uses the initials adopted by the court of appeals for the victim and the other acts witness, which are not their actual initials.

a Walgreens parking lot the day before A.B. died, but maintained that he sold only marijuana, not heroin. (R. 128:179.) Surveillance footage at the Walgreens showed that Osornio had what appeared to be a drug transaction with another person, Y.Z, five minutes before Osornio arrived. (R. 128:179.) Osornio told police that he sold marijuana to Y.Z., too. (R. 128:179.) Y.Z., however, reported that Osornio sold her heroin and that she had bought heroin from him previously. (R. 128:151–53.)

The State charged Osornio with reckless homicide by heroin delivery and with the underlying heroin delivery. (R. 26.) The offenses were multiplicitous because heroin delivery is legally a lesser-included offense of the homicide offense, and it was based on the same facts. (Pet-App. 7.)

Because Osornio did not dispute selling drugs to A.B., Osornio's trial turned on two factual disputes. First, did Osornio sell A.B. heroin? (Pet-App. 10.) Second, did the heroin play a substantial factor in A.B.'s death? (Pet-App. 30.)

B. Jury Deliberations

Although Osornio's two charges were multiplicitous, neither the parties nor the trial court noticed before the jury began deliberations. (Pet-App. 7.) The State charged reckless homicide as Count One and heroin delivery as Count Two. (R. 26.)

The jury exited for deliberations at 12:30 p.m. (R. 127:138.) At 3:45 p.m., the jury sent a note to the trial court that read: "We have a conclusion on Count Two. We cannot come to an agreement on Count One. How should [*sic*] we proceed?" (R. 83:2; 127:140.) The parties agreed to answer this question with Criminal Jury Instruction 520, the so-called "*Allen*[5] charge" that directs jurors to "make an honest and sincere attempt to arrive at a verdict." (R. 127:142, 144.)

[5] *Allen v. United States*, 164 U.S. 492 (1896).

The jury continued deliberating. At 6:10 p.m., the jury asked to see the text messages between A.B. and Osornio. (R. 83:3.)

At 6:20 p.m., Osornio, through trial counsel, noticed the multiplicity problem and informed the trial court. (R. 127:149.) Osornio argued that the jury would have issued a verdict solely on heroin delivery at 3:45 p.m. had it received the lesser-included offense instruction—Criminal Jury Instruction 112. (R. 127:149–50.) Therefore, Osornio argued that the 3:45 p.m. jury note entitled him to a directed verdict finding him guilty only of heroin delivery. (R. 127:149–50.) The trial court denied the motion. (R. 127:151–52, 167–68.)

At approximately 7:16 p.m., the trial court read the jury a modified, shortened version of the lesser-included offense instruction by agreement of the parties. (R. 127:158–59.) The instruction read: "You should make every reasonable effort to agree unanimously on your verdict on Count 1. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on Count 1, you should sign your verdict on Count 2." (R. 127:158–59.)

The jury deliberated for another hour. At approximately 8:16 p.m., it issued its verdict, finding Osornio guilty of both counts. (R. 127:160.) The judgment of conviction corrected the multiplicity issue so that Osornio was convicted and sentenced only for reckless homicide. (R. 117:1.)

C. The Court of Appeals Reverses

Osornio argued that trial counsel was ineffective for failing to notice the multiplicity issue and request the lesser-included offense instruction before the jury began

deliberations. (R. 156:6–13.)[6] At a *Machner* hearing, both of Osornio's trial attorneys testified that they simply missed the issue. (R. 164:7, 9, 19–20.) The trial court rejected the claim because it concluded that Osornio failed to prove prejudice. (R. 171:2.)

The court of appeals reversed. It ruled that the circuit court erred in concluding that Osornio was not prejudiced. (Pet-App. 29–33.) The Argument section will address the court of appeals' reasoning in greater detail.[7] The State now petitions for review.

ARGUMENT

This Court should grant review to correct two errors of law and to prevent courts from making the same errors in the future.

To establish the ineffective assistance of trial counsel, Osornio had to prove both (1) "that counsel's performance was deficient"; and (2) "that such performance prejudiced the defense." *State v. Roberson*, 2006 WI 80, ¶ 24, 292 Wis. 2d 280, 717 N.W.2d 111 (citing *Strickland*, 466 U.S. at 687). Failure on one prong dooms the entire claim. *Savage*, 395 Wis. 2d 1, ¶ 25. Here, only prejudice is disputed. Whether a defendant proved prejudice is reviewed *de novo*. *Id.*

To prove prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional

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[6] Osornio also raised this argument through claims of plain error and manifest justice, but the court of appeals did not address those. (Pet-App. 33 n.12.)

[7] The court of appeals initially issued an opinion on June 26. The State moved for reconsideration, citing some statements in the opinion about multiplicity that appeared to conflict with settled law. On July 18, the court of appeals granted the motion and issued a revised opinion omitting those statements. The outcome and the analysis on prejudice remained the same.

errors, the result of the proceeding would have been different." *State v. Carter*, 2010 WI 40, ¶ 37, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland*, 466 U.S. at 694). "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Although that is not as difficult a standard to meet as "more likely than not," the difference matters "only in the rarest case." *Richter*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 693, 697).

The court of appeals committed two legal errors in evaluating prejudice. First, it flipped the burden of proof from Osornio to the State. Second, it reduced a "reasonable probability" to anything that is more than "conceivable." Had the court of appeals not committed these errors, it would have concluded that Osornio failed to prove prejudice. This Court should grant review.

A. The court of appeals inverted the burden of proof.

The court of appeals purportedly required Osornio to prove prejudice. (Pet-App. 22.) However, it failed to hold Osornio to his burden and, instead, concluded that the State had failed to disprove a reasonable probability of a different result.

The court of appeals began by deeming it "very likely," without explanation, that there was a "reasonable probability" that the "hypothetical verdict" at 3:45 p.m. would have been guilty on heroin delivery, only, based on the jury's note. (Pet-App. 29.) The court of appeals acknowledged "merit to the State's argument," but then stated, "the State fails to persuade us that there is not a substantial likelihood that a [properly instructed] jury" would have "return[ed] a verdict of

guilty on the heroin delivery count alone." (Pet-App. 31.) The court of appeals explained further that the jury's deliberations after 3:45 p.m. "do not establish what would have happened by about 3:45 p.m." if the jury had been "properly instructed from the start." (Pet-App. 31, 33.) The court of appeals reiterated the point in the following paragraph: "[T]he fact of extended subsequent jury deliberations . . . is not necessarily inconsistent with a reasonable probability" of a more favorable result. (Pet-App. 32.)

In each of these statements, the court of appeals accepted as a given that the 3:45 p.m. jury note created a reasonable probability of a more favorable result and then deemed the State's arguments inadequate to rebut that conclusion. That reasoning erroneously shifted the burden of proof under *Strickland*. These were not isolated misstatements. The court of appeals dedicated only ten paragraphs to applying the prejudice standard—two of which were dedicated to introducing and concluding the issue. (Pet-App. 29–33.) These statements are derived from three of those ten paragraphs. By resting its conclusion on the State's failure to disprove prejudice rather than Osornio's ability to prove prejudice, the court of appeals erred as a matter of law in a decision recommended for publication. This Court should therefore grant review.

B. The court of appeals diluted the "reasonable probability" standard.

As it did with the burden of proof, the court of appeals identified the correct authorities to define a "reasonable probability" for the purpose of *Strickland* prejudice. (Pet-App. 22, 32–33.) However, it then misread those authorities and misapplied the standard.

The court of appeals overread the requirement that a "reasonable probability" be more than "conceivable." (Pet-

App. 31, 33.) The court of appeals turned prejudice into a binary standard between the "conceivable," which would be insufficient, and anything more than conceivable, which would be a reasonable probability. The court of appeals ostensibly held that "there is a substantial, and not merely a conceivable, likelihood that a jury that was properly instructed from the start would have reached the more favorable result for Osornio." (Pet-App. 33.) However, the court of appeals previously showed its misunderstanding of what constitutes "substantial." It stated that the jury's 3:45 p.m. note "create[d] a *substantial probability* that the jury *might* have returned" a more favorable verdict. (Pet-App. 32 (emphasis added).) Based on this view, the court of appeals did "not decide whether it was somewhat more likely, or perhaps somewhat less likely, that the jury under those circumstances would have deadlocked on the greater offense or instead would have returned a verdict of guilty on that offense. Either way, our confidence in the outcome is undermined." (Pet-App. 32.)

The court of appeals' understanding of a reasonable probability runs counter to U.S. Supreme Court precedent. The "substantial probability" of something that "might" happen is not a "reasonable probability." *See Strickler v. Greene*, 527 U.S. 263, 291 (1999) (distinguishing in the *Brady* context an insufficient "reasonable *possibility*" from the sufficient "reasonable *probability*"). By equating somewhat more likely and somewhat less likely outcomes, the court of appeals ruled contrary to *Richter*—even as it cited to *Richter*. (Pet-App. 33.) *Richter* explained that a "reasonable probability" is technically an easier standard to satisfy than "more likely than not," but the difference matters "only in the rarest case." *Richter*, 562 U.S. at 112 (quoting *Strickland*, 466 U.S. at 697). Thus, if the more favorable outcome was "somewhat less likely," then the court of appeals should have concluded that Osornio failed to prove prejudice. (Pet-App.

32.) Even if the outcomes were equally likely, the court of appeals needed to explain why Osornio's case presented the "rarest case" in which the distinction between reasonably probable and more likely than not mattered. *Richter*, 562 U.S. at 112 (citation omitted). By explicitly failing to address the critical boundary highlighted by *Richter*, the court of appeals erroneously turned a "reasonable probability" into anything that is more than conceivable.

This Court should grant review to clarify what *Strickland* prejudice requires.

C. Had the court of appeals applied the correct standard, it would have affirmed.

The court of appeals did not discount the State's affirmative argument. (Pet-App. 31.) Its holding depended on an erroneous conception of *Strickland* prejudice. (Pet-App. 31.) A proper application of *Strickland* prejudice leads to concluding that Osornio failed to prove prejudice.

By simply accepting that the 3:45 p.m. note created a reasonable probability of a different result, the court of appeals gave insufficient weight to the State's alternative interpretation of the note. (Pet-App. 29.) The initial failure to give the jury the lesser-included offense instruction deprived the jury of two critical directives. First, the jury was not told to consider the reckless homicide offense first and to proceed to the heroin delivery offense only if it could not agree on reckless homicide. Wis. JI–Criminal 112 (2000). Second, the jury was not admonished to "make every reasonable effort to agree unanimously" on reckless homicide before considering heroin delivery. Wis. JI–Criminal 112 (footnote omitted).

With this understanding in mind, the jury's 3:45 p.m. note does not necessarily communicate deadlock on the reckless homicide offense. Lacking those two directives, the jury could very well have been considering the two offenses in tandem and not yet exhausted their efforts on the homicide

offense. Had the jury deliberated in this fashion, it would have recognized that agreement on the first three of the five elements of the reckless homicide offense necessarily meant agreement on the heroin delivery offense, which was comprised entirely of those three elements. (Pet-App. 6–7.) This dispute was plausible given that the parties reasonably disputed whether the delivered heroin caused A.B.'s death—the fourth and fifth elements of reckless homicide. (Pet-App. 7, 30.)

Accordingly, when the jury told the trial court that it had agreed on the delivery offense but not on homicide, the jury was stating that it had agreed on the first three elements of reckless homicide but not the fourth and fifth without necessarily saying that it had exhausted its efforts to agree on reckless homicide. By reducing the first three elements of reckless homicide to heroin delivery, the jury simplified the result of their deliberations. The jury reasonably asked for guidance on how to proceed because it had not been told to exhaust its efforts deliberating on reckless homicide. In this view, the 3:45 p.m. note is not an alternative verdict.

Had the trial court not provided follow-up instructions to the jury, Osornio may very well have satisfied his burden to prove prejudice. But that is not what unfolded. Rather, the trial court rectified the two omissions created by the failure to initially provide the lesser-included offense instruction. The *Allen* instruction admonished the jury to "make an honest and sincere attempt to arrive at a verdict." (Pet-App. 23 & n.11.) The jury continued deliberating. (Pet-App. 23.) At 7:16 p.m., the modified lesser-included offense instruction reiterated that admonishment and explicitly allowed the jury to issue a verdict only on heroin delivery:

> You should make every reasonable effort to agree unanimously on your verdict on Count 1. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on Count

> 1, you should sign your verdict on Count 2 and inform the Court of your verdict.

(Pet-App. 25.) One hour after receiving that instruction, the jury returned a guilty verdict on both Counts. (Pet-App. 25.)

The jury's continued deliberations and verdict show that the State's interpretation of the 3:45 p.m. note is more reasonable than the court of appeals' and Osornio's. Once the trial court told the jury to exhaust its efforts on reckless homicide and that it could return a verdict only on heroin delivery, the jury continued deliberating and issued a verdict on both offenses. "Jurors are assumed to follow jury instructions." *Seifert v. Balink*, 2017 WI 2, ¶ 143, 372 Wis. 2d 525, 888 N.W.2d 816. Just as the jurors presumably followed the instructions they received during deliberations, the jurors would have presumably followed the instructions in the same manner had it received them before beginning deliberations.

The court of appeals, on the other hand, presumed that the jurors could have understood the lesser-included offense instruction differently before they began deliberating than they did after they began deliberating. (Pet-App. 32.) Neither the court of appeals nor Osornio explained why the jurors' understanding of the substance of the lesser-included offense instruction would differ depending on when it received the instruction.

That lack of explanation should have been dispositive and illustrates the importance of the burden of proof to this case. The State provided a reasonable explanation steeped in the circumstances of the trial. The court of appeals simply asserted that Osornio's interpretation of the 3:45 p.m. note was reasonable enough. (Pet-App. 31–32.) Had the court of appeals held Osornio to his burden to prove prejudice, it would have recognized that the jury's continued deliberations in response to the supplemental instructions precluded Osornio from proving a reasonable probability of a different result.

* * *

This is a close case. But that is why properly applying the standard for *Strickland* prejudice matters. This Court should seize this opportunity to clarify that the defendant bears the burden to prove prejudice and that a reasonable probability is not simply anything more than conceivable.

CONCLUSION

This Court should grant the petition for review.

Dated this 6th day of August 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
michael.conway@wisdoj.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 4,147 words.

Dated this 6th day of August 2025.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of August 2025.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY