STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2011AP001625

In re the Commitment of Scott R. Schmidt:

STATE OF WISCONSIN,
Petitioner-Respondent,

v.

SCOTT R. SCHMIDT,
Respondent-Appellant.

On Notice of Appeal from an Order of Commitment under Wis. Stat. § 980.06 and an Order Denying Postcommitment Relief, Both Entered in Walworth County Circuit Court, the Honorable John R. Race, Presiding

---

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

STEVEN D. GRUNDER
Assistant State Public Defender
State Bar No. 1068023

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
grunders@opd.wi.gov

Attorney for Respondent-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

ISSUE PRESENTED

1. Where, as here, a jury hears repeated recitations of a Ch. 980 respondent's graphic first-person narratives of decades-old sexual assault, is the respondent entitled to a new trial in the interest of justice?

The trial court adopted the state's responsive memorandum, and therefore denied Mr. Schmidt's motion on grounds of waiver and harmlessness.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The issues in this case involve the application of established law to the facts of record and can be adequately addressed by the parties' briefs.

STATEMENT OF FACTS

Mr. Schmidt was convicted of four counts of first-degree sexual assault in Walworth County Case No. 90-CF-100338, along with counts of burglary, false imprisonment, and witness intimidation. Mr. Schmidt had forced his way into the apartment of a woman named Brenda, whom he bound, forcibly sexually assaulted, and threatened with a knife. (1:1-3).

Mr. Schmidt was paroled in 2003, and revoked in 2008. The state filed the petition in this case before the running of his revocation term in July 2009. (1:1, 2, 4).

At trial, the parties stipulated to the facts of the 1990 sexual assault, and the stipulation was read to the jury at the commencement of the state's case. (45:6-7, 147-150). The remainder of the state's case consisted of two witnesses. Douglas Geske had been Mr. Schmidt's probation agent, and he testified about Mr. Schmidt's activities on supervision, including the behaviors that led to his revocation: viewing pornographic materials on the internet and being terminated from his sex offender treatment for dishonesty. (45:151, 153, 164-65). Christopher Snyder is a forensic psychologist who, after examining Mr. Schmidt's record, concluded that he is a sexually violent person subject to Wis. Stat. Ch. 980 commitment. (45:196, 261-62).

During the state's questioning of Dr. Snyder, it elicited from him a summary of Mr. Schmidt's "issues regarding his sexual development and sexual behavior prior to" the 1990 rape. (45:211). Dr. Snyder included in this summary a series of incidents that Mr. Schmidt had admitted to in the course of his sex offender treatment at Oshkosh Correctional in the mid-1990s. (45:212). Dr. Snyder related that Mr. Schmidt had engaged in frottage:[1]

> ten times with female victims between the ages of ten and twenty-seven. He reported fondling their breasts, buttocks and vaginas with his hands and without consent. He also reported that he had raped five females between the ages of fourteen and forty-two who were friends, neighbors and strangers…. During the course of these rapes he reported vaginally and orally raping the women by forcing penis to vagina intercourse or him performing oral sex on the victim. He also disclosed that he had engaged in voyeurism, window peeping, with twenty to thirty victims between the ages of sixteen and

[1] Dr. Snyder defined frottage as "rubbing against people that are unsuspecting for purposes of sexual gratification." (45:212-213).

> forty-two sometimes looking with binoculars through their windows, watching them undress and things of that nature. And he also said that he involved himself in exhibitionism with four females in the same age group and that he would either be completely naked or wearing light colored shorts with no underwear so the victims could see his penis.

(45:213-14).

Having just elicited the above testimony from Dr. Snyder, the state then asked him a series of questions directed at having him repeat it piece-by-piece:

> Q. So Mr. Schmidt admitted that there had been ten female victims of what you described as frottage?
>
> ….
>
> A. Rubbing against and touching unwanted body parts and things like that.
>
> Q. And who were those victims? Did he indicate in general terms?
>
> A. Yes. These were people known to him. He indicated that they were family members, strangers and babysitters.
>
> Q. And what did he report doing to them?
>
> A. Touching their breasts, buttocks and vaginas with his hands and without consent.
>
> Q. And he self-disclosed that there were five female rape victims as well?
>
> A. Correct.

Q. And he reported vaginally and orally raping the women by force, penis to vagina intercourse?

A. Correct.

Q. Anything else in that regard? Anything about oral sex?

A. Yes. That he himself performed oral sex on some of the victims.

Q. And you said he indicated there were approximately twenty to thirty victims of his voyeurism?

A. Correct.

Q. And that's peeping, basically?

A. Peeping Tom, yes.

(45:214-16).

During cross-examination of Dr. Snyder, Mr. Schmidt's attorney questioned him regarding trial Exhibit 21, a document in which Mr. Schmidt disclosed various instances of sexual misconduct. (46:65). The specific issue was how or whether Mr. Schmidt's Static-99 score should be affected by the fact that, when he was a juvenile, he lifted the nightgown of a sleeping girl and looked at her breasts. (46:75-81). On redirect, the state again turned Dr. Snyder's attention to Exhibit 21:

Q. If you'd take a look at that. I'll be fairly brief. But since [defense counsel] quoted from it I'm going to ask you to do the same a little bit. When I refer to page numbers, I'm referring to the Bates stamp numbers.

A. All right.

Q. Would you go to 861, please.

A. I have it.

Q. And these are Mr. Schmidt's statements?

A. Yes.

Q. Would you read the paragraph – second full paragraph starting with, I will ask, please.

A. I will ask my victims if they ever had an orgasm. To kiss me, touch my penis and/or tell me to speed up or slow down. I feel a sense of relief if I ejaculated. I will untie the victim's hands as a phony act of caring thinking I've done enough and I wonder if she will tell. I will look around her apartment for a purse or checkbook to steal hoping she fears I know her name, address and phone number therefore she'll be too scared to report me. I will threaten to hurt her or her family if she does.

Q. Page 862, please, last paragraph, if you would read the same staring with, I expect.

A. I expect my victims to enjoy being raped, to be submissive, to tell me how great I am and invite me back over after I rape them. I commit rape to feel powerful, superior, and in control. To degrade and humiliate my victims. To get even for all the perceived wrongs inflicted on me. For what I perceive, as teasing me and/or rejecting me. I tell myself females are property and sex objects for my own sexual gratification.

Q. 871, please.

A. Yes.

Q. Second full paragraph, watching remove her tops. Same, please.

A. Watching her remove her tops, I smile to myself. Lick my lips in anticipation and swallow hard. I feel aroused, controlling, powerful, and superior. I see a faint look of disgust on Brenda's face. I think, that's right, bitch, you're here for my pleasure now. You're getting what you deserve, my penis. I'm the boss now, you'll do as I say, and you don't want me to get pissed and start beating you, pulling your hair, and slapping you.

Q. Page 873, please.

A. Yes.

Q. Last paragraph starting, Brenda kicks –

A. Brenda kicks me hard in the chest then runs for the door. I fell off the back of her bed. Feeling angry I think, I got to get this bitch, and if she gets to the street, I'm screwed. Then I hear Brenda scream. I get up quickly and violently grab Brenda's throat. Clutching it very tightly and crushingly cutting off her air supply. Feeling nervous I think, someone will hear her scream and rescue her and I got to shut her up. With Brenda holding onto the screen door as tight she can, I grabbed her arm forcibly and pull until she let's go. Then I drag her by her arm and throw her brutally back on the bed. Realizing Brenda was willing to run out of her apartment naked to escape I think, she's not good enough to get away from me. I feel powerful, controlling, superior and unique.

(46:107-110).

After having Dr. Snyder read Mr. Schmidt's words regarding two other incidents of attempted or completed sexual offenses, the state returned to the five assaults that it had already elicited twice from Dr. Snyder:

> Q. Paragraph numbered two if you would read that, please.
>
> A. Beginning rape?
>
> Q. Correct.
>
> A. Five female victims, ages 14 years old to 42 years old. Friends, neighbors and strangers. I vaginally and/or orally rape them. I use my hands, mouth and/or penis. I feel out of control, rejected, jealous and revengeful because of marital problems. I rape to get my control back and get my revenge on my wife.

The state then rested its case. (46:112, 122).

For his case, Mr. Schmidt presented two expert psychologist witnesses: Dr. Charles Lodl and Dr. Sheila Fields. They opined, contrary to Dr. Snyder, that Mr. Schmidt is *not* more likely than not to reoffend. (46:124-25, 187-88; 203-04, 240). Mr. Schmidt also called his daughter and his former supervisor in an outside-the-walls prison work program. (47:5-6; 14-15). Both testified to aspects of Mr. Schmidt's character.

The state called one witness in rebuttal, Agent Geske. The entirety of its questioning consisted of having him read from Exhibit 21 the following:

> Three weeks before raping Brenda I watched her walk into her apartment form the store parking lot from across the street. I rape fantasized her -- about her for three

> weeks prior to brutally raping her. I got to her apartment at 8:00 PM on April 9, 1990. I lied to her and asked to use her phone so I could call a friend who lived in the same apartment complex as she did. I bought a knife and change of clothes to wear that night, put the knife in my back pocket before going into Brenda's apartment. I went there to violently rape her. Brenda was alone and trusted me to make a phone call and leave. While in her apartment I faked a phone call and attacked her on the bed. I raped her orally with my mouth and penis, vaginally with my mouth, penis and fingers and cruelly rubbed her breasts. I tied Brenda's hands up when she tried to escape and viciously grabbed her throat and choked her -- and choked her when she would scream. I terrified her by intimidating her and threatening her with a knife. The rape lasted about ninety minutes. About three weeks later I was arrested after calling Brenda's apartment.

(47:35-36).

In its closing argument, the state again repeated the litany of Mr. Schmidt's admissions: "[frottage], the rubbing against women without their permission or consent ten times who were family friends, strangers, babysitters. Rape, five female victims between the ages of 14 and 42. Voyeurism, 20 to 30 victims between the ages of 16 and 42. Exhibitionism, four victims throughout the course of his life." (47:48).

The state also re-read to the jury some of the paragraphs that it had had Dr. Snyder read: the ones beginning "I will ask my victims if they ever had an orgasm …"; "I expect my victims to enjoy being raped…"; and "Brenda kicks me hard in the chest…." (47:48-50). The state explained that this "horrific" material was important because it needed the jury "to have an insight into (Mr. Schmidt's)

mindset when he committed these assaults as to what type of victim he looks for, how he behaves, how he thinks, how he feels, the things he said and did." (*Id*. at 48). As to the statements regarding the rape of Brenda, the state explained that they mattered, even though the rape was more than 20 years previous, "because much like his sexual offense history has continued throughout his life, you have to look at his treatment history." (47:50).

Mr. Schmidt was committed as a sexually violent person. (29; App. 111). He filed a motion for postdisposition relief, requesting a new trial in the interest of justice because the jury heard evidence which unfairly appealed to the jurors' fear, revulsion, and instinct to punish. (33). The state filed a memorandum in response, arguing that Mr. Schmidt's claim was waived by trial counsel's failure to object to that evidence. (34:1-4; App. 102-105). Further, the state argued that even if error occurred, it did not warrant reversal. Because there was "compelling evidence" that Mr. Schmidt was a sexually violent person, his substantial rights were not affected by the challenged evidence. (34:4-8; App. 105-109). Mr. Schmidt submitted a reply brief, noting that his claim was made in the interest of justice, and that the state had applied the wrong legal standard in its harmless error analysis. (35). The circuit court, adopting the state's brief as its rationale, denied Mr. Schmidt's motion in a written order. (36; App. 101).

This appeal follows.

ARGUMENT

Mr. Schmidt is Entitled to a New Trial in the Interest of Justice, Because the Jury Heard – Repeatedly, in the State's Case-in-Chief, as the State's Only Rebuttal Evidence, and in the State's Closing Argument – Mr. Schmidt's "Horrific" Account of His 1990 Index Offense, in Addition to Other Inflammatory Disclosures Made by Mr. Schmidt in Sex Offender Treatment in the Mid-1990s.

A. Applicable legal principles

This Court may grant a new trial in the interest of justice if it concludes that the "real controversy was not fully tried." ***Vollmer v. Luety***, 156 Wis. 2d 1, 456 N.W.2d 797 (1990). When the error complained of "goes directly to the crux of the case," the appellant need not show that the results of a retrial would probably be different. ***State v. Cuyler***, 110 Wis. 2d 133, 142-43, 327 N.W.2d 662 (1983). This Court's inherent power and express statutory authority to reverse and remit a case for a new trial in the interest of justice exists even where the circuit court has denied a motion for that relief. Wis. Stat. § 752.35; ***State v. Penigar***, 139 Wis. 2d 569, 577-78, 408 N.W.2d 28, 32-33 (1987).

In ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), the Wisconsin Supreme Court said that situations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) where the trier of fact was erroneously not given the opportunity to hear important evidence; and (2) where the jury had before it evidence not properly admitted which so clouded a crucial issue that it may fairly be said that the real controversy was

not fully tried. Mr. Schmidt's claim falls under the second category.

In order to prove that Mr. Schmidt is a sexually violent person, the state was required to show three things: 1) that he had been convicted of a sexually violent offense, 2) that, at the time of trial, he had a mental disorder, and 3) that his mental disorder made it more likely than not that he would commit future acts of sexual violence. Wis. JI-Criminal 2502. The first two elements were not in dispute. Mr. Schmidt did not (and could not) deny that he had been convicted of a sexually violent offense in the 1990 rape of Brenda. Further, even the experts Mr. Schmidt relied on diagnosed him with mental illnesses. (46:171-72). The case thus turned on whether his disorder or disorders render him more likely than not to commit a future sex offense. Dr. Snyder opined that Mr. Schmidt was more likely than not to reoffend; Drs. Lodl and Fields disagreed. (46:124-25, 187-88; 203-04, 240).

A Ch. 980 respondent's history of sexual misconduct is undoubtedly relevant to whether he has a mental disorder rendering him more likely than not to commit future offenses. *See* ***State v. Wolfe***, 2001 WI App 136, ¶¶37-40, 246 Wis. 2d 233, 631 N.W.2d 240. Relevant evidence is generally admissible. Wis. Stat. § 904.02. Further, the Wis. Stat. § 904.04 restraint on "other acts" evidence that applies in a criminal case does not apply in a Ch. 980 commitment. *See* ***Wolfe***, 246 Wis. 2d, ¶¶37-40; ***State v. Franklin***, 2004 WI 38, ¶14, 270 Wis. 2d 271, 677 N.W.2d 276.

However, Wis. Stat. § 904.03, which directs the exclusion of relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice," *does* apply in Ch. 980 cases. *See* ***Wolfe***, 246 Wis. 2d 233, ¶16, ***Franklin***, 270 Wis. 2d 271, ¶39. Evidence is unfairly

prejudicial if it has "a tendency to influence the outcome by improper means" or if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish" or otherwise causes a jury "to base its decision on something other than the established propositions in the case." *See* ***Christensen v. Economy Fire & Casualty Co.***, 77 Wis. 2d 50, 61, 61 n.11, 252 N.W.2d 81 (1977).

B. The real controversy – Mr. Schmidt's present and future dangerousness – was not fully tried, because the jury improperly heard multiple recitations of Mr. Schmidt's graphic, first-person narratives of sexual assault, which he provided in treatment in the mid-1990s.

Mr. Schmidt's graphic and disturbing descriptions of his past sex offenses were substantially more unfairly prejudicial than they were probative. Mr. Schmidt's past conduct is relevant and probative under ***Franklin*** and ***Wolfe*** to illustrate the presence of a mental disorder. 246 Wis. 2d 233, ¶40; 270 Wis. 2d 271, ¶22. This is because a factfinder could conclude that Mr. Schmidt's past sex offenses were in part a product of, and therefore evidence for, a mental disorder – a disorder that Mr. Schmidt may still have today, and a disorder that may fulfill one of the elements of a Ch. 980 commitment. The past sex offenses may also be relevant to show the nature of this disorder and thus bear on the likelihood that the disorder makes him more likely than not to reoffend.

However, each of the incidents described in detail above happened at least 20 years ago, if not well before. They are self-reported assaults; with the exception of Brenda, there is no evidence that any other assault victims came forward to accuse Mr. Schmidt. Indeed, Mr. Schmidt has but

one sexual-assault conviction on his criminal record. Even if Mr. Schmidt's uncorroborated admissions accurately represent his offense history, their probative value is diminished by Mr. Schmidt's aging and the fact that all occurred before Mr. Schmidt had ever been caught and punished for a sex offense. (46:162). Their probative value is reduced still further by the extensive treatment that Mr. Schmidt received during his incarceration and supervision. Finally, the probative value of the self-reported assaults diminishes further yet in proportion to any exaggeration or embellishment by Mr. Schmidt.

Meanwhile, the unfairly prejudicial value of the statements is obviously quite high. There can be no doubt that, for example, Mr. Schmidt's emotionally charged recollection of his assault on Brenda in 1990 would tend to "appeal[] to the jury's sympathies, arouse[] its sense of horror, [and] provoke[] its instinct to punish." ***Christensen***, 77 Wis. 2d at 61 n. 11. In fact, the state itself described the account as "horrific." (47:48). The immediacy and graphic nature of the description would tend to place it front and center in the juror's mind, despite the state's (correct) disclaimer that "[t]his isn't a trial about the past." (47:45). *See* ***State v. Post***, 197 Wis. 2d 279, 307, 541 N.W.2d 115 (1995) ("[T]he focal point of commitment is not on past acts but on current diagnosis of a present disorder suffered by an individual that specifically causes that person to be prone to commit sexually violent acts in the future.") A juror presented with these statements would face a strong temptation to commit Mr. Schmidt without regard to the testimony of the experts or the juror's own sober assessment of Mr. Schmidt's likelihood of committing another such act, simply because the 20-year-old event is so despicable and, when vividly described in the first person and the present tense, so frightening.

This unfairly prejudicial effect was amplified by the fact that the statements were presented to the jury repeatedly, despite the fact that the parties had stipulated to the facts of the underlying assault. The state solicited them from Dr. Snyder on redirect, stating that it was doing so in response to the defense's use of the document containing the statements during its case – though the defense's use of the document was regarding an entirely different subject. The state asked exactly one question in its rebuttal case, which was simply a request for Agent Geske to read yet another description of the assault – though it is unclear how this constituted "rebuttal" of any evidence that the defense had put forward. *See* ***Rausch v. Buisse***, 33 Wis. 2d 154, 167, 146 N.W.2d 801 (1966) (general rule is that rebuttal "may only meet the new facts put in by the defendant in his case in reply"). The state then read extensively from the statements again during its closing argument.

Similarly, the descriptions of Mr. Schmidt's other assaults were introduced repeatedly – twice consecutively during the direct examination of Dr. Snyder, once again in redirect, and again in closing, despite the fact that Mr. Schmidt never denied or disputed their nature. The state's repeated use of all of Mr. Schmidt's descriptions of his offenses was cumulative, and only increased their tendency to inflame the jury and provoke a finding for commitment without regard to the standards of Ch. 980. *See* ***Whitty v. State***, 34 Wis. 2d 278, 297, 149 N.W.2d 557 (1967) ("Evidence of prior crimes or occurrences should be sparingly used by the prosecution and only when reasonably necessary. Piling on such evidence as a final 'kick at the cat' when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence.").

C. The trial court erred by deciding the interest-of-justice claim on waiver, and by employing the wrong legal standard to find any possible error harmless.

There was no objection to the admission of the statements at issue. Mr. Schmidt is therefore pursuing a new trial in the interest of justice, on the grounds that the statements so clouded a crucial issue – present and future dangerousness – that the real controversy was not fully tried. Because this is an interest-of-justice claim, the trial court's reliance on waiver to deny the claim is misplaced. *See* ***State v. Romero***, 147 Wis. 2d 264, 274-75, 281, 432 N.W.2d 899 (1988) (court may address a claim even if it was not preserved by a proper objection made at trial by considering whether the error requires a new trial in the interest of justice).

A second problem with the trial court's decision is that the harmless-error analysis employed by the state, and adopted by the trial court, is inapposite. That standard – "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict'" – is described as the state's memorandum as the "lower standard applicable in civil litigation." (34:5, n.1; App. 106, n.1). However, the referenced standard is, as the cited authority demonstrates, the standard that the federal courts apply to collateral (habeas corpus) attacks on errors in state jury trials. ***Brecht v. Abrahamson***, 507 U.S. 619, 637 (1993). That standard is not the test for harmless error in direct appeals or postcommitment motions under Wis. Stat. (Rule) 809.30. In fact, in Wisconsin, "[t]he test for harmless error in civil cases is the same as that in criminal cases." *See, e.g.*, ***Hannemann v. Boyson***, 2005 WI 94, ¶57, 282 Wis. 2d 664,

698 N.W.2d 714. That test is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Id.*** (Citation omitted.).

The memorandum's harmlessness analysis, adopted by the trial court, recounts selected evidence supporting the jury's verdict (34:5-6; App. 106-107), but overlooks key evidence contrary to the verdict: two of the three appointed experts opined that Mr. Schmidt does not meet the Ch. 980 standard of dangerousness, and that they sharply disagreed with Dr. Snyder's scoring of the actuarial instrument used. (46:176-79, 187-88, 221-26, 239-40). Given these facts, and applying the proper test for harmless error, there is simply no basis to conclude, beyond a reasonable doubt, that the state's repeated presentation of the disputed material did not contribute to the verdict.

As the state accurately notes in its memorandum, most evidence introduced by the state is prejudicial. (34:8; App. 109). Chapter 980 trials usually, if not always, include facts that would disturb most jurors. What sets Mr. Schmidt's case apart is the immediacy and detail of the *first-person* assault narratives. Perhaps Mr. Schmidt's descriptions reflected his thoughts and feelings years ago, thoughts and feelings he was instructed to divulge freely and in detail as part of treatment. (*See*, *e.g.*, 46:114-119, 157-160; 47:37-39). But the issue for the jury was not whether Mr. Schmidt had committed a brutal and repellent crime in 1990. He had. The parties stipulated to the facts of the assault and associated charges, and those facts were read to the jury. (45:147-150). Had that been the extent of the evidence regarding the index offense, unfair prejudice would have been substantially mitigated if not eliminated.

However, the stipulation did not keep the state from returning to Mr. Schmidt's most lurid treatment disclosures again and again. It is one thing for a jury to hear facts and allegations presented in the third person, as in a criminal complaint. It is quite another to hear what a rapist is thinking, in the present tense and in his own words, as he commits a series of assaults. Jurors would have a natural tendency to believe that anyone who ever thought like that must think like that now, and will probably always think like that.

Because of the repeated, shocking first-person descriptions of Mr. Schmidt's crimes of more than 20 years ago, there is a great risk that the jury committed him not because of his disputed present and future dangerousness, but because of his past transgressions. This Court has the authority to order a new trial in the interest of justice where unfairly prejudicial evidence so clouded a crucial matter that the real issue was not fully tried. Mr. Schmidt believes that this is such a case.

CONCLUSION

For the reasons set forth above, Scott Schmidt respectfully requests that this Court vacate his commitment order and remand the case to the circuit court for a new trial.

Dated this 27th day of October, 2011.

Respectfully submitted,

STEVEN D. GRUNDER
Assistant State Public Defender
State Bar No. 1068023

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
grunders@opd.wi.gov

Attorney for Respondent-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,320 words.

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 § 809.19(12). I further certify that:

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

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

Dated this 27th day of October, 2011.

Signed:

STEVEN D. GRUNDER
Assistant State Public Defender
State Bar No. 1068023

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
grunders@opd.wi.gov

Attorney for Respondent-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 27th day of October, 2010.

Signed:

STEVEN D. GRUNDER
Assistant State Public Defender
State Bar No. 1068023

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
grunders@opd.wi.gov

Attorney for Respondent-Appellant