

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2009AP3073-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF
APPEALS, DISTRICT II, AFFIRMING AN ORDER OF
THE CIRCUIT COURT FOR WINNEBAGO COUNTY,
THE HON. THOMAS J. GRITTON, PRESIDING

BRIEF OF THE INNOCENCE NETWORK
AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-
APPELLANT-PETITIONER, MICHAEL R. GRIEP

Keith A. Findley
Wis. Bar No. 1012149
President
THE INNOCENCE NETWORK
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763
kafindle@wisc.edu

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

ARGUMENT 1

I. DNA EXONERATIONS AND CRIME LAB SCANDALS TEACH THAT FORENSIC SCIENCE IS NOT IMMUNE FROM ERROR 4

1. Unvalidated and Improper Forensic Science is a Leading Cause of Wrongful Conviction 4

2. Crime Lab Scandals Have Led to Miscarriages of Justice 6

II. SURROGATE TESTIMONY IS INSUFFICIENT TO VINDICATE A DEFENDANT’S CONSTITUTIONAL INTEREST IN CROSS-EXAMINING SCIENTIFIC WITNESSES AGAINST HIM..... 9

III. CONCLUSION 14

CERTIFICATION AS TO FORM AND LENGTH 16

CERTIFICATION OF COMPLIANCE WITH Rule 809.19(12)..... 16

TABLE OF AUTHORITIES

Cases

<i>Bullcoming v. New Mexico</i> , 131 S. Ct. 2705 (2011).....	1, 2, 3, 13
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	4, 9
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	10, 12, 14
<i>Hinton v. Alabama</i> , 134 S. Ct. 1081 (2014).....	9
<i>In Re Invest. of W. Virginia State Police Crime Lab., Serology Div.</i> , 438 S.E.2d 501 (W. Va. 1993)	8
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009)	1, 2, 7, 9, 12
<i>United States v. Addison</i> , 498 F.2d 741 (D.C. Cir. 1974).....	11
<i>United States v. Frazier</i> , 387 F.3d 1244 (11th Cir. 2004)	11
<i>Williams v. Illinois</i> , 132 S.Ct. 2221 (2011).....	2, 7

Other Authorities

- Brief of Amici Curiae the New York County District
Attorney's Office and the Office of the Chief
Medical Examiner In Support of Respondent,
Williams v. Illinois, 132 S.Ct. 2221 (2011) 7
- Michael R. Bromwich, *Final Report of the
Independent Investigator for the Houston Police
Department Crime Laboratory and Property Room
at 4* (June 13, 2007)..... 5, 9
- Nick Bunkley, *Detroit Police Lab Is Closed After
Audit Finds Serious Errors in Many Cases*, NY
TIMES, September 25, 2008 8
- Eric Dexheimer, *Latest Drug Exoneration Displays
Familiar Pattern*, STATESMAN, April 23, 2014..... 11
- I.E. Dror, D. Charlton & A.E. Peron, *Contextual
Information Renders Experts Vulnerable To Making
Erroneous Identifications*, 156 Forensic Sci. Int'l 74-
78 (2006) 12
- Keith A. Findley, *Innocents At Risk: Adversary
Imbalance, Forensic Science, and the Search for
Truth*, 38 Seton Hall L. Rev. 893, 943 (2008) 11
- Brandon L. Garrett & Peter J. Neufeld, *Invalid
Forensic Science Testimony and Wrongful
Convictions*, 95 Va. L. Rev. 1 (2009) 5
- Innocence Project, *Know the Cases: Curtis McCarty*..... 6

Innocence Project, *Know the Cases: Josiah Sutton*5

Sally Jacobs, *Annie Dookhan Pursued Renown Along
A Path Of Lies*, BOSTON GLOBE, Feb. 3, 2013 7

Joel D. Lieberman et. al., *Gold Versus Platinum: Do
Jurors Recognize the Superiority and Limitations of
DNA Evidence Compared to Other Types of
Forensic Evidence?*, 14 Psychol. Pub. Pol'y & L. 27,
50-51 (2008)..... 13

NATIONAL ACADEMY OF SCIENCES, Committee on
Identifying the Needs of the Forensic Sciences
Community, STRENGTHENING FORENSIC SCIENCE
IN THE UNITED STATES: A PATH FORWARD 44
(2009)6-7, 8

Maurice Possley, et al., *Scandal Touches Even Elite
Labs*, CHICAGO TRIBUNE, Oct. 21, 2004 8

Tovia Smith, *Crime Lab Scandal Leaves Mass. Legal
System In Turmoil*, NPR, March 14, 2013 7

State of New York Office of the Inspector General,
*Investigation into the New York City Office of Chief
Medical Examiner, Department of Forensic Biology*,
Dec. 2013 8

The National Registry of Exonerations, University of
Michigan Law School & Center on Wrongful
Convictions at Northwestern University School of
Law.....4

Jim Herron Zamora, *Lab Scandal Jeopardizes Integrity Of S.F. Justice Sting Uncovered Bogus Certification*, SAN FRANCISCO EXAMINER, September 16, 1994 8

ARGUMENT

Though it may come to the courtroom cloaked in an aura of infallibility, “[f]orensic evidence is not uniquely immune from the risk of manipulation,” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009), bias or mistake. Forensic science is, rather, a human endeavor, subject to all the prejudice, caprice, and error that human beings are capable of. The interest of criminal defendants facing forensic evidence in exposing such infirmities through cross-examination is not merely obvious; it is also constitutionally protected. As the Supreme Court made clear in *Melendez-Diaz* and later cases, forensic evidence is no exception to the Confrontation Clause; where the state seeks to introduce it, the defendant must be afforded the opportunity to actually confront the witness against him—*not* a surrogate. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

In an effort to end-run this Constitutional protection, the State here has styled its surrogate witness an “expert” and produced him to testify to the substance of another analyst’s report, without introducing the actual report. But neither the Constitution nor fairness is satisfied by this process of functionally, if not actually, admitting the substance of a non-

testifying analyst’s report through expert testimony. *See Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz*, 557 U.S. at 310-11 (finding testing certificates testimonial where, *inter alia*, they were “functionally identical to live, in-court testimony”). This clear precedent has remained unchanged by the plurality in *Williams v. Illinois*, 132 S.Ct. 2221 (2011): at a minimum, the majority of the Supreme Court clearly rejects the notion that formalized test results, offered for the truth of the matter, can be implicitly admitted under the guise of expert testimony without confrontation.¹ However *Williams* is read, *Bullcoming* remains good law, and under *Bullcoming*, lab results introduced, whether by surrogate or directly, for the truth of the matter are testimonial and must be confronted. *See Williams*, 132 S.Ct. at 2233 (distinguishing the blood alcohol report in *Bullcoming* from the *Williams* DNA profile because the former “was introduced at trial for the substantive purpose of proving the truth of the matter asserted by its out-of-court author—namely, that the defendant had a blood-alcohol level of 0.21”).

¹ *See, e.g., Williams*, 132 S.Ct. at 2233, 2236-37, 2243, 2256-58, 2268-69.

The state and the lower court attempted to evade this clear holding by labeling the proffered testimony as “independent” of the original report. But the analyst’s testimony was entirely based on the report; indeed, the analyst had no basis whatsoever other than the report for his opinion that the test was performed and performed properly, and that it generated results which allowed him to echo that Mr. Griep had a certain blood alcohol level. *See infra* Part II. Such conclusions all derived solely from the report. The analyst here was no less a surrogate for the testimonial conclusions of the non-testifying analyst than the analyst in *Bullcoming*.² Outside of flat assertions to the contrary, the state does not, and cannot, explain how this testimony was actually independent and thus how it does not run afoul of *Bullcoming*’s clear command.³

The state’s attempt to evade confrontation is thus not only wrong as a matter of law; it also thwarts the truth-seeking functions of the criminal justice system. As the DNA exonerations and crime lab scandals discussed *infra* demonstrate, forensic testimony is not inherently objective or

² It bears note that the testifying analyst in *Bullcoming* also qualified as an expert. *Bullcoming*, 131 S.Ct. at 2713.

³ Mr. Griep addresses these arguments in more detail; the Network’s brief focuses instead on the increased risks of wrongful convictions that would result from permitting such unconflicted testimony.

neutral, but is often the result of a subjective process that may be flawed, fraudulent, biased, or wrong. Surrogate expert testimony of the kind proffered here insulates all of these problems from the “crucible of cross-examination,” *Crawford v. Washington*, 541 U.S. 36, 61 (2004), and thus from the jury’s scrutiny— a scrutiny that the Network’s experience teaches is necessary to ensuring the fair administration of justice.

I. DNA EXONERATIONS AND CRIME LAB SCANDALS TEACH THAT FORENSIC SCIENCE IS NOT IMMUNE FROM ERROR.

1. Unvalidated and Improper Forensic Science is a Leading Cause of Wrongful Conviction

Unvalidated or improper forensic science is a leading cause of wrongful convictions, playing a role in the cases of almost half of the 321 wrongfully convicted people in the United States who have been exonerated by DNA testing.⁴ These cases, with flaws running the gamut from incompetence and negligence to outright fraud, demonstrate how critical it is to protect a defendant’s right to cross-examine the analyst who

⁴ Because DNA exists in only a small percentage of cases, these numbers likely greatly understate the scope of wrongful conviction. See The National Registry of Exonerations, University of Michigan Law School & Center on Wrongful Convictions at Northwestern University School of Law, available at <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (documenting over 1,400 DNA and non-DNA exonerations nationwide).

actually tested the evidence against him.⁵ For example, Josiah Sutton became a victim of “significant and pervasive problems with the analysis and reporting of results” in the Houston Police Department Crime Lab⁶ when he was wrongfully convicted of rape based in part on an analyst’s erroneous testimony that inculpatory DNA was an exact match with Mr. Sutton, such that only 1 person in 694,000 could have contributed. In reality, 1 in 16 black men shared the profile found.⁷ Later DNA testing exonerated Mr. Sutton completely.⁸

Outright forensic fraud resulted in Curtis Edward McCarty serving 21 years in prison—including 19 on death row—for a murder he did not commit. A forensic examiner, Joyce Gilchrist, compared hairs from the crime scene with Mr. McCarty’s and initially found that they were not similar. After three years of continued police investigation, Gilchrist secretly changed her notes to say that the hairs in fact could have come from Mr. McCarty. She testified to this conclusion at two trials,

⁵ See, e.g., Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009).

⁶ See Michael R. Bromwich, *Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 4 (June 13, 2007), <http://hpdlabinvestigation.org/reports/070613report.pdf>.

⁷ Innocence Project, *Know the Cases: Josiah Sutton*, http://www.innocenceproject.org/Content/Josiah_Sutton.php.

⁸ *Id.*

resulting in Mr. McCarty being sentenced to death.⁹ DNA evidence ultimately exonerated Mr. McCarty, along with two other innocent people wrongfully convicted on the basis of Gilchrist's false testimony.¹⁰

These cases and the other exonerations demonstrate that forensic science is subject to error; to present it to a jury without the scrutiny of direct confrontation is to increase the very real risk of wrongful conviction.

2. *Crime Lab Scandals Have Led to Miscarriages of Justice*

Lessons about the fallibility of forensic sciences and scientists can also be gleaned from the so-called crime lab scandals. As the National Academy of Sciences wrote in its watershed 2009 report on forensic science, “the integrity of crime laboratories increasingly has been called into question, with some highly publicized cases highlighting the sometimes lax standards of laboratories that have generated questionable or fraudulent evidence and that have lacked quality control measures that would have detected the questionable

⁹ Innocence Project, *Know the Cases: Curtis McCarty*, http://www.innocenceproject.org/Content/Curtis_McCarty.php.

¹⁰ *Id.*

evidence.”¹¹ In Massachusetts last year, for example, a drug analyst named Annie Dookhan repeatedly engaged in drylabbing (that is, reported results of tests that were never conducted) and evidence tampering, compromising as many as 34,000 cases.¹² Dookhan’s fraud went undetected for years, shielded by the pre-*Melendez-Diaz* cases that protected her from confrontation about her work.¹³

In New York, after the New York County District Attorney’s Office (“NYCDA”) extolled the infallibility of its Office of The Chief Medical Examiner (“OCME”) technicians in a *Williams v. Illinois* amicus brief arguing against the right to confront the testing analyst,¹⁴ the OCME was forced to reexamine hundreds of rape cases after a lab technician was found to have mishandled or overlooked critical DNA

¹¹ NATIONAL ACADEMY OF SCIENCES, Committee on Identifying the Needs of the Forensic Sciences Community, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 44 (2009) (“NAS Report”).

¹² Tovia Smith, *Crime Lab Scandal Leaves Mass. Legal System In Turmoil*, NPR, March 14, 2013, available at <http://www.npr.org/2013/03/14/174269211/mass-crime-lab-scandal-reverberates-across-state>.

¹³ Sally Jacobs, *Annie Dookhan Pursued Renown Along A Path Of Lies*, BOSTON GLOBE, Feb. 3, 2013, <http://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD33lRwXatSvMCL/story.html> (“*Melendez-Diaz* was tough at first on [Dookhan]” (italics added)). Compare *Melendez-Diaz*, 557 U.S. at 339 (dissent arguing exposing analysts to confrontation would not result in changed testimony).

¹⁴ Brief of Amici Curiae NYCDA and OCME In Support of Respondent at 12-14, *Williams*, 132 S.Ct. 2221 (“Mandatory quality assurance procedures . . . virtually ensure that the laboratory will detect and correct any error that might occur.”).

evidence.¹⁵ The scandal also revealed that the lab's deputy director breached lab protocol and inappropriately reassigned cases, rewrote reports (including changing the report's supposed author), and removed analyses from case files when she disagreed with them on at least two occasions.¹⁶

Similar misconduct has taken place all over the country,¹⁷ including San Francisco,¹⁸ Detroit,¹⁹ and West Virginia.²⁰ Investigations of the Houston Crime Lab, for instance, uncovered drylabbing and other serious problems,

¹⁵ State of New York Office of the Inspector General, *Investigation into the New York City Office of Chief Medical Examiner: Department of Forensic Biology*, Dec. 2013, [http://ig.ny.gov/pdfs/OCMEFinal Report.pdf](http://ig.ny.gov/pdfs/OCMEFinal%20Report.pdf).

¹⁶ *Id.* Such disagreement between analysts is precisely the kind of issue that can be hidden when only an expert surrogate testifies. *See id.* at 32-33 (“Of particular note, the suspect report in the case at issue was rewritten six times; yet, after each revision, the computer . . . overwrote the previous draft and only the most current draft remained. As such, the reader of the final report would be ignorant of the dissension among the criminalists . . .”).

¹⁷NAS Report at 44-48; Maurice Possley, et al., *Scandal Touches Even Elite Labs*, CHICAGO TRIBUNE, Oct. 21, 2004, available at http://articles.chicagotribune.com/2004-10-21/news/0410210285_1_crime-lab-paul-ferrara-lab-s-director (“[E]vidence of problems ranging from negligence to outright deception has been uncovered at crime labs in at least 17 states.”).

¹⁸ Jim Herron Zamora, *Lab Scandal Jeopardizes Integrity Of S.F. Justice Sting Uncovered Bogus Certification*, SAN FRANCISCO EXAMINER, September 16, 1994, at A7.

¹⁹ Nick Bunkley, *Detroit Police Lab Is Closed After Audit Finds Serious Errors in Many Cases*, NY TIMES, September 25, 2008, available at http://www.nytimes.com/2008/09/26/us/26detroit.html?_r=0.

²⁰ *In Re Invest. of W. Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W. Va. 1993).

including the incompetence that led to Josiah Sutton's wrongful conviction.²¹

As with the DNA exonerations, the crime lab scandals demonstrate the necessity of scrutinizing forensic science through the lens of direct cross-examination.

II. SURROGATE TESTIMONY IS INSUFFICIENT TO VINDICATE A DEFENDANT'S CONSTITUTIONAL INTEREST IN CROSS-EXAMINING SCIENTIFIC WITNESSES AGAINST HIM.

The DNA exonerations and crime lab scandals are stark proof of the “threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts.” *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014). Ensuring that only valid and reliable science is used against criminal defendants requires vigorous confrontation, which is “designed to weed out not only the fraudulent analyst, but the incompetent one as well.” *Melendez-Diaz*, 557 U.S. at 319. The Constitution accordingly “commands . . . that reliability be assessed . . . by testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61. Cross-examination is, thus, “the principal means by which the believability of a witness and the

²¹ Bromwich, *supra* fn.6.

truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). But filtering forensic conclusions through an expert surrogate insulates forensic science from cross-examination, and in so doing, prevents a jury from evaluating that evidence’s reliability.

This insulating effect results from the fact that expert surrogate testimony necessarily rests on a series of unproven assumptions—namely, that the original test or tests were actually conducted and that they were conducted properly, competently, and impartially. The testifying analyst in this case, for example, based his conclusion on assumptions that “the procedures were followed, [and that] the instrument was operating properly, properly calibrated,” despite having no personal knowledge of these assertions.²² His testimony also consistently assumed that the tests had, in fact, been performed and performed properly.²³ The Network’s experience both with exonerations and with crime lab scandals demonstrates, however, that such assumptions are simply unwarranted. An expert testifying to the substance of Annie Dookhan’s reports,

²² App. F, A-AP146 (Tr. 30-31). His testimony also consistently assumed that the tests had, in fact, been performed and performed properly.

²³ *See id.* at A-AP150 (Tr. 34) (Q. “And so you don’t have any personal knowledge as to whether or not this sample was clotted, do you?” A. “That is why we keep laboratory records. The sample did not clot.”).

for example, would not know Dookhan had not completed the tests she claimed to have done, and so would appear credible when testifying to Dookhan's conclusions. In the face of such facially credible testimony, no jury could conclude that the proffered results were actually fraudulent. Even innocent defendants—who presumably know they are innocent with more certainty than a jury—have been induced to plead guilty when confronted with apparently 'infallible' laboratory analyses that were, in fact, false.²⁴

The difficulty of exposing any misdeeds by the original testing analyst through "expert" confrontation is exacerbated by the fact that even when directly confronted, "juries are likely to consider [forensic sciences] objective and infallible."²⁵ Preventing the defense from examining the *actual* nature and circumstances of the tests conducted will only

²⁴ Eric Dexheimer, *Latest Drug Exoneration Displays Familiar Pattern*, STATESMAN, April 23, 2014, <http://www.statesman.com/weblogs/investigations/2014/apr/23/latest-drug-exoneration-follows-pattern/>.

²⁵ Keith A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 943 (2008); see also *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors . . ."); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence may "assume a posture of mythic infallibility in the eyes of a jury of laymen").

amplify the tendency of jurors to accept forensic evidence uncritically.

Fraud is not the only problem that surrogate testimony can hide; issues of professional competence, procedural failures, or cognitive bias are also likely to go unexplored where surrogate testimony is permitted. This latter point is particularly significant, as even scrupulous forensic examiners applying well-established scientific assays can be affected by cognitive bias. Research indicates that extraneous contextual information given to examiners can unconsciously compromise objectivity and bias results.²⁶ *See also Melendez-Diaz* 557 U.S. at 318 (“A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution”); *Davis*, 415 U.S. at 316-17 (confrontation permits cross-examination “directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand”). A surrogate expert will have no way of knowing what

²⁶ *See, e.g.,* I.E. Dror, D. Charlton & A.E. Peron, *Contextual Information Renders Experts Vulnerable To Making Erroneous Identifications*, 156 *Forensic Sci. Int'l* 74-78 (2006).

external pressures or contextual information may have unconsciously affected the testing analyst, and so a defendant will be prevented from exploring this key area on cross-examination.²⁷

Functionally admitting the substance of a non-testifying analyst's report through "expert" testimony is patently insufficient to guard against unreliable forensic science. The actual examiner's procedures, biases, mistakes, and even corruption, will all be washed out in the glow of expert testimony that, by its nature, can only discuss idealized practices. For this reason, the Constitution mandates not that a defendant be given the opportunity to examine *any* person with the ability to read a lab report and speak to standard practice,²⁸ but that he be able to mount a "more particular attack on the

²⁷ E.g., Joel D. Lieberman et. al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psychol. Pub. Pol'y & L. 27, 50-51 (2008) ("Without adequate cross-examination, most jurors were not cognizant of the potential for observer effects or the importance of proficiency testing and therefore were unable to accurately assess the reliability of the lab.").

²⁸ See *Bullcoming*, 131 S. Ct. at 2714-15 ("Suppose a police report recorded an objective fact—. . . [like] the address above the front door of a house or the read-out of a radar gun. Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.'" (internal citation omitted)).

witness' credibility . . . by means of cross examination.” *Davis*, 415 U.S. at 316-17. When a defendant is forced to accept the sanitized conclusions of a professional witness in lieu of examining the analyst who actually conducted the tests against him, he is denied his right to mount this more “particular attack,” the need for which the DNA exonerations and crime lab scandals make plain.

III. CONCLUSION

The right of a defendant to actually confront the forensic witnesses against him is not an empty constitutional formality. Rather, it is vital to ensuring that criminal trials are fair and accurate. Forensic science and scientists can be, and often are, wrong, and wrong in ways that allow the guilty to go free and the innocent to be punished. Insulating forensic testimony from cross-examination prevents a defendant from exposing the flaws that can lead to such unjust results. Using an expert to avoid the import of the Supreme Court's Confrontation Clause precedents is thus not only unconstitutional; it also poses a serious danger to the fair administration of justice. The Decision of the Court of Appeals should be reversed.

Dated this 28th day of October, 2014.

Respectfully submitted,

Keith A. Findley
Wis. Bar No. 1012149
President
THE INNOCENCE NETWORK
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763
kafindle@wisc.edu

Dana M. Delger*
M. Chris Fabricant*
David Loftis*
40 Worth Street, Suite 701
New York, New York 10013
(212) 364-5964
ddelger@innocenceproject.org
Attorneys for *Amicus Curiae*
* Not admitted in Wisconsin

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,998 words.

Keith A. Findley

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). 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. 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.

Keith A. Findley