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SUPREME COURT**

**STATE OF WISCONSIN  
IN SUPREME COURT  
CASE NO. 2019AP2356 -CR**

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**State of Wisconsin,**

**Plaintiff-Respondent-Respondent,**

**v.**

**Philip W. Vaughn,**

**Defendant-Appellant-Petitioner.**

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**NO-MERIT PETITION FOR REVIEW**

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**DENNIS SCHERTZ**

**Schertz Law Office  
P.O. Box 133  
Hudson WI 54016  
(715) 377-0295  
denschertz@mac.com**

**Attorney for the Defendant-  
Appellant-Petitioner**

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Under the no-merit procedure of Rule 809.32, the defendant-appellant-petitioner will draft this section of the petition for review.

### **ISSUES PRESENTED**

Under the no-merit procedure of Rule 809.32(4), the defendant-appellant-petitioner will draft this section of the petition for review.

### **CRITERIA FOR REVIEW**

Under the no-merit procedure of Rule 809.32(4), the defendant-appellant-petitioner will draft this section of the petition for review.

## STATEMENT OF THE CASE

### Statement of Facts

The appellant, Philip Vaughn, was charged by complaint with one count of possession of child pornography “on or about Friday, July 03, 2015,” which was based upon images found by investigators on a laptop and flash drive seized at his residence during the execution of a search warrant. R.1. Following a preliminary hearing, Vaughn was charged with a second count of possession of child pornography “on or about Tuesday, August 18, 2015” in an Information filed on January 18, 2017. R.7.

On the first day of trial, the State presented the testimony of numerous experts regarding the images found on the hard drive of the laptop (and the flash drive), the first of whom testified that he had no idea when the files containing the images had been created or when they were downloaded to the laptop, and that it was possible that someone else could have saved the files to the hard drive prior to the time that Vaughn had bought the previously-owned computer. R.128:173.

On the second day of trial, the State's final expert witness was the digital forensics examiner who had examined the hard drive and flash drives on which the images were found, and who had earlier assisted the investigators when they executed the search warrant at Vaughn's residence. R.132:375-79. She explained that unallocated space is space on a computer's hard drive that is not allocated to an active file, that deleted files will often be found in an unallocated space on a hard drive. R.132:380. She later testified that all

of the fragments of the files she recovered “based on – or using the keywords that I had in – or from the Affidavit and search warrant. Most of them were coming from unallocated space, which indicated to me that all files had been deleted.” R.132:399-400.

On cross-examination, the witness agreed that a user accessible file was one that a user could open without any special tools, which would be in allocated space, rather than unallocated space, which is where deleted files would be. R.132:424-25. She also agreed that there was no way to know when the five images recovered from laptop had been created, but that the two images found on the flash drive (recovered from Vaughn’s wife’s purse) were created in 2012. R.132:440-42. Finally, she agreed that only one folder found on the flash drive, named “Kingsoft Office,” was user accessible. R.132:445.

After the State rested, the defense called a single expert witness who had analyzed the hard drives from the laptop and the flash drive and whose ultimate, expert conclusion was that “In the two devices [he] examined, there were no user accessible files containing child pornography.” R.132:544. Under cross-examination, the witness agreed that commercial software is available to recover deleted files on a flash drive. R.132:559. The jury eventually brought back guilty verdicts on both counts. R.132:659.

Mr. Vaughn appealed the judgment of conviction (R.117) on the grounds that there was insufficient evidence for the jury’s verdicts. While his notice of appeal also indicated an appeal of the court’s denial of his postconviction motion, he did not appeal the order denying his motion.

### Procedural History

This is an appeal from the judgment of conviction, entered October 19, 2018 in the circuit court for Barron County, Maureen Boyle, Judge. In a decision issued May 18, 2021, the court of appeals affirmed the judgment and order. App., A101. After being advised of his right to do so because of post-conviction counsel's conclusion that there would be no merit to a petition for review, Mr. Vaughn requested that postconviction counsel draft and file certain parts of the petition for review under the no-merit procedure of Rule 809.32(4) and understands his obligation to file a supplemental petition for review pursuant to that rule, a copy of which has been provided to him.

### ARGUMENT

Under the no-merit procedure of Rule 809.32(4), the defendant-appellant-petitioner will draft this section of the petition for review.

RESPECTFULLY SUBMITTED this 28th day of May, 2021.

Schertz Law Office  
Attorney for the Defendant-  
Appellant-Petitioner

By:   
Dennis Schertz

**APPENDIX**

**Court of Appeals' Decision ..... A101**

CERTIFICATION

I certify that this petition for review conforms to the rules contained in sec. 809.19(8) (b) and (c), Stats., for a petition produced using a proportional serif font. The length of this no-merit petition for review is 654 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that: I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that: This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

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

Dated: May 28, 2021

Schertz Law Office

By:   
Dennis Schertz  
State Bar No. 1024409

P.O. Box 133  
Hudson WI 54016  
(715) 377-0295