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STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2013AP1424-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES ELVIN LAGRONE,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Richard J. Sankovitz, Presiding, and from an Order Denying the Postconviction Motion, the Honorable Jeffrey A. Wagner, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES

ISSUES PRESENTED

1. In ***State v. Weed***, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485, this Court held that circuit courts *must* conduct a personal, on-the-record colloquy when a criminal defendant waives his fundamental constitutional right to testify at trial. Is a circuit court required to conduct a personal, on-the-record colloquy regarding the waiver of the right to testify at the second phase of a bifurcated criminal proceeding?

The circuit court found that the Fifth Amendment right to testify does not apply at the second phase of a bifurcated criminal proceeding. Consequently, no colloquy regarding the waiver of the right to testify was required. The court of appeals declined to decide this issue of first impression, finding that any error was harmless.

2. Does the harmless error doctrine apply when a circuit court fails to conduct a colloquy regarding the waiver of the right to testify?

The circuit court did not address this question. The court of appeals answered yes, relying on ***State v. Nelson***, 2014 WI 70, 355 Wis. 2d 722, 849 N.W.2d 317, which applied harmless error analysis to a circuit court's refusal to allow a defendant to *exercise* the right to testify, not an allegation that the defendant was *unaware* of the right to testify.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE AND FACTS

Introduction

An active trombone and trumpet player, James Elvin Lagrone went to college to study music. (5:2; 8:2; 12:8; 20:2). However, at the age of 19 or 20, he started having auditory hallucinations, including hearing voices and receiving "subliminal messages" from the television. (8:2, 4; 20:3, 4). For the next 36 years, Mr. Lagrone floated in and out of various mental health facilities. (5:1-2; 8:2; 20:3).

When in the community, Mr. Lagrone has held a variety of employment including working as a freelance musician, a food service worker, and a part-time teacher of music education. (5:2; 8:2, 6-7; 12:8; 20:2-3). He also receives Social Security Disability Insurance (SSDI). (8:2; 12:8; 20:3).

Most recently, Mr. Lagrone was living in Milwaukee in an apartment receiving antipsychotic medication daily. (8:2). Due to side effects, including chronic tremors, which interfered with his ability to play music, Mr. Lagrone was switched to a new antipsychotic medication. (5:2, 5; 8:3, 4, 6). However, after reading about the possible side effects of the new medication, Mr. Lagrone discontinued the medication. (5:2-3; 8:3, 4). After Mr. Lagrone told his case manager that he was no longer taking medication and made a threat to harm his case manager, he was brought to the Milwaukee County Mental Health Complex, where he was

voluntarily admitted on April 20, 2011. (8:3, 4, 7). According to the case manager, a mental health commitment was sought, but dismissed, after no witnesses showed up for the probable cause hearing. (8:7). Mr. Lagrone was released on April 27, 2011. (8:3, 4, 7).

Several days later, on April 30, 2011, Mr. Lagrone forced his way into his ex-girlfriend B. M. J.'s home. (2:2). According to the criminal complaint, over the next day, Mr. Lagrone prevented her from leaving, choked her until she lost consciousness, grabbed and pulled on her breasts, inserted his finger into her vagina, and stuck an unknown object into her anus. (2:2-3, 4-5). When someone came to the home to visit B. M. J., Mr. Lagrone fled the residence in B. M. J.'s car. (*Id.*). That same day, Mr. Lagrone was taken into custody in Portage, Wisconsin after he approached a police officer parked at a gas station. (2:3).

According to the officer, Mr. Lagrone appeared to be "somewhat upset" and "drooling." (12:5). When Mr. Lagrone got out of the car:

> his belt was undone and his pants began falling down around his ankles. I asked how I could help him. He began mumbling about almost killing his girlfriend and that he was driving a stolen vehicle and he was wanted by the Milwaukee Police Department. The subject was hallucinating and stating Saten [sic] was talking to him.

(*Id.*).

Mr. Lagrone was charged with five counts: (1) strangulation and suffocation, domestic abuse, contrary to Wis. Stat. §§ 940.235(1) & 968.075; (2) false imprisonment, domestic abuse, contrary to Wis. Stat. §§ 940.30 & 968.075; (3) second-degree sexual assault, domestic abuse, contrary to Wis. Stat. §§ 940.225(2)(a) & 968.075; (4) first degree

recklessly endangering safety, domestic abuse, contrary to Wis. Stat. §§ 941.30(1) & 968.075; and (5) operating a vehicle without the owner's consent, domestic abuse, contrary to Wis. Stat. §§ 943.23(3) & 968.075. (2:1-2).

Pre-Trial Proceedings

After the initial appearance, at the request of defense counsel, the court ordered a competency evaluation. (39:3-4). Dr. Robert Rawski, who treated Mr. Lagrone in the past, filed a competency report opining that Mr. Lagrone suffers from paranoid schizophrenia, but was competent to stand trial. (5:3, 5; 40:2). Dr. Rawski noted that Mr. Lagrone's "cognition was improved" compared to the past most likely due to the absence of marijuana use in recent weeks. (5:3). However, he observed that Mr. Lagrone "still has difficulties recalling dates, durations and some chronological history; for example, he could not reasonably estimate when [his original medication] was changed [to a new medication] or when his girlfriend moved out." (*Id.*).

A preliminary hearing was held and the court found probable cause that Mr. Lagrone committed a felony. (41:11). Mr. Lagrone pled not guilty and not guilty by reason of mental disease or defect ("NGI"). (*Id.*).

Dr. John Pankiewicz examined Mr. Lagrone for purposes of the NGI plea and filed a report opining that while Mr. Lagrone's mental illness played some part in the offense, there was insufficient evidence to find that the "predominant factor in Mr. Lagrone's offense related behavior was a consequence of his mental illness." (8:9). Consequently, Dr. Pankiewicz could not conclude to a reasonable degree of medical certainty that Mr. Lagrone lacked substantial capacity to understand the wrongfulness of his actions or conform his behavior to the requirements of the law. (*Id.*).

Dr. Anthony Jurek, a defense expert, also examined Mr. Lagrone and filed a report regarding the NGI plea. Dr. Jurek opined that at the time of the offense, paranoid schizophrenia impaired Mr. Lagrone's capacity to understand the wrongfulness of his behavior and rendered him unable to conform his behavior to the requirements of law. (12:9-10).

Subsequently, defense counsel requested a second competency evaluation because when she went to meet with Mr. Lagrone he was "unable to function," and "bringing up inappropriate religious things in the middle of our discussions. He was shaking." (46:2-3). The court granted the request. (46:5). Dr. Deborah L. Collins filed a report opining that Mr. Lagrone was presently competent to proceed. (20:6). However, the report "urge[d] court officers to remain sensitive in the event of any significant changes in Mr. Lagrone's overall mental status and or compliance with psychiatric treatment. Such changes may signal fluctuations in his competency and warrant his re-examination." (*Id.*).

Bifurcated Criminal Proceeding

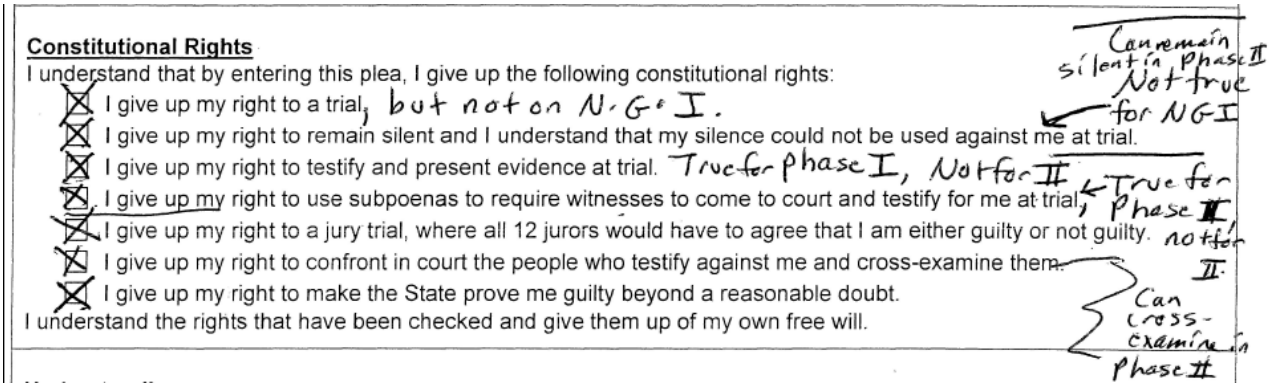
A. First Phase

For the guilt phase ("first phase"), Mr. Lagrone pled guilty to all five counts. (48:6).

A standard plea questionnaire was filed with the court along with numerous other documents including an addendum[1] (21:3), an e-mail from the State reflecting the plea

[1] The addendum stated that Mr. Lagrone was giving up his right to challenge the sufficiency of the complaint and "defenses such as alibi, intoxication, and self-defense." (21:3). The addendum also noted in handwriting that "[i]nsanity phase to be tried to a jury or judge. Not giving this up." (*Id.*).

offer (21:4), the State's original plea offer letter (21:5-6), a chart listing the penalties for each count and collateral consequences (21:6-10), and jury instructions for each count (21:11-24). Handwriting on the plea questionnaire referenced "NGI" and "phase II":



Constitutional Rights

I understand that by entering this plea, I give up the following constitutional rights:

- ☒ I give up my right to a trial, but not on N.G.I.
- ☒ I give up my right to remain silent and I understand that my silence could not be used against me at trial.
- ☒ I give up my right to testify and present evidence at trial. True for phase I, Not for II
- ☒ I give up my right to use subpoenas to require witnesses to come to court and testify for me at trial.
- ☒ I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty.
- ☒ I give up my right to confront in court the people who testify against me and cross-examine them.
- ☒ I give up my right to make the State prove me guilty beyond a reasonable doubt.

I understand the rights that have been checked and give them up of my own free will.

Can remain silent in phase II Not true for NGI

True for phase II, not for II

Can cross-examine in phase II

(21:1; App. 119).[2]

During the plea colloquy, the circuit court confirmed generally that Mr. Lagrone understood all of the documents submitted to the court. (48:11-12). However, the circuit court never specifically confirmed that Mr. Lagrone understood that he had a right to testify at the second phase.

B. Second Phase

For the mental responsibility phase ("second phase"), Mr. Lagrone waived his right to a jury trial after an on-the-record colloquy with the court. (48:20-24). A two-day court trial took place, the Honorable Richard J. Sankovitz presiding. (49; 50; 51).

[2] Since the circuit court denied Mr. Lagrone's request for an evidentiary hearing, there is nothing in the record establishing the source of the handwriting on the plea questionnaire.

The defense presented testimony from arresting officer Jeffrey Stumpf, Mr. Lagrone's case manager Alan Balcerak, and Dr. Anthony Jurek, who opined that at the time of the offense Mr. Lagrone suffered from paranoid schizophrenia, which caused him to lack capacity to understand the wrongfulness of his behavior and rendered him unable to conform his behavior to the requirements of law. (49; 50). Mr. Lagrone did not testify.

Dr. John Pankiewicz testified for the State and opined that he could not find that at the time of the offense Mr. Lagrone lacked substantial capacity to understand the wrongfulness of his actions or conform his behavior to the requirements of the law. (51; 8). Additionally, the State provided the court with a recording of the statements Mr. Lagrone made to the police two days after his arrest. (51:19-26).

The court found Mr. Lagrone did not meet his burden of proving that at the time of the offense he lacked substantial capacity to understand the wrongfulness of his actions or conform his behavior to the requirements of the law. (51:41-42).

At no point during the second phase did the circuit court conduct a personal, on-the-record colloquy regarding whether Mr. Lagrone understood that he had a right to testify at the second phase, that the decision to testify was his to make, that no promises or threats were made to influence his decision, or that he had discussed his decision with his attorney. *See* Wis JI-Criminal SM-28.

C. Sentencing Hearing

On May 25, 2012, Mr. Lagrone was sentenced to a prison term of 12 years (six years of initial confinement and six years of extended supervision). (52:40, 45-46; 27).

Postconviction Proceedings

Mr. Lagrone filed a postconviction motion seeking an evidentiary hearing and an order granting a new trial on the second phase of the bifurcated criminal proceeding. (34:1, 5; App. 114, 118). As grounds, Mr. Lagrone asserted that the circuit court erred in failing to conduct an on-the-record colloquy regarding the waiver of his right to testify at the second phase, and that he did not understand that he had the right to testify at the second phase. (34:1, 4; App. 114, 117).

The Honorable Jeffrey A. Wagner denied Mr. Lagrone's postconviction motion without a hearing. (35; App. 111-13). The circuit court found that Mr. Lagrone did not have a fundamental constitutional right to testify during the second phase. (35:3; App. 113). The court stated that "[i]n the absence of either a fundamental right or a statutory duty on the part of the court to conduct a colloquy concerning the right to testify in a Phase II proceeding, the court declines to hold an evidentiary hearing, particularly where the defendant has not set forth anything in his motion of what his testimony would have been." (*Id.*).

The court of appeals affirmed in an unpublished decision. ***State v. James Elvin Lagrone***, No. 2013AP1424-CR, unpublished slip op. (WI App Apr. 7, 2015) (App. 101-10). The court of appeals declined to decide whether there is a fundamental right to testify at the second phase of a bifurcated criminal proceeding, concluding that any error was

harmless. ***Id.***, ¶ 13 (App. 106-07). Specifically, the court of appeals stated:

> [w]hile it is of course the State's burden to prove that an error was harmless, it has adequately met that burden in a case where there was, by Lagrone's own admission, plenty of evidence to support the trial court's verdict and where Lagrone has not submitted any evidence to the contrary.[3] As noted, Lagrone failed to offer any evidence regarding what his testimony at the second phase of his trial might have been. While his motion asserted that he did not understand that he had the right to testify at the second phase of the NGI proceeding, there was no affidavit explaining that he did not understand that he could have testified at the second phase of the proceeding. Likewise, there was no discussion, in the motion or in an affidavit, explaining why, if Lagrone did not truly understand that he could have testified, his plea questionnaire and waiver-of-rights form contained handwritten notation [sic] indicating that Lagrone was giving up his right to testify in the first phase but not the second phase of the proceeding. And again, there was no explanation of what Lagrone would have testified to at the second phase of the proceeding had he chosen to do so, or how that testimony would have affected the trial's outcome. Without any sort of offer of proof from Lagrone regarding what his testimony might have been, we cannot conclude that Lagrone's decision not to testify—regardless of whether that decision resulted from the trial court's error—had any effect on the trial's outcome.

Id., ¶ 18 (App. 108-09) (citations omitted). Footnote three states:

> Lagrone does not argue that the evidence at the mental responsibility phase of his proceeding was insufficient to support the trial's verdict that Lagrone did not lack substantial capacity to appreciate the wrongfulness of his

> actions or to conform his behavior to the requirements of law.

Id., ¶ 18 (App. 108-09).

ARGUMENT

I. A Circuit Court Is Required to Conduct a Personal, On-The-Record Colloquy with a Defendant Regarding the Waiver of the Right to Testify at the Second Phase of a Bifurcated Criminal Proceeding.

A. Introduction.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." ***Harris v. New York***, 401 U.S. 222, 225 (1971). "The decision whether [a] defendant will testify is a choice between mere passivity at trial and active participation through which the defendant can inject his own acts, voice and personality into the process. Taking the stand is the defendant's opportunity, if he wants it, to face his accusers and the jury, tell his story, submit to examination, and exercise such ability as he may have to persuade those who will make a decision that may vitally affect his life…." ***Wright v. Estelle***, 572 F.2d 1071, 1081 (5th Cir. 1978) (Godbold, J., dissenting).

In ***Rock v. Arkansas***, the United States Supreme Court held that a criminal defendant's right to testify on his own behalf is a fundamental constitutional right. 483 U.S. 44, 52 (1987). The right is rooted in several provisions of the federal constitution, including the Fourteenth Amendment's guarantee of due process of law, the Sixth Amendment's right to compulsory process for obtaining witnesses in the defendant's favor, and the Fifth Amendment's guarantee against compelled testimony. ***Id***. at 51-53.

Likewise, Article I, Section 7 of the Wisconsin Constitution guarantees criminal defendants "the right to be heard by himself" and the right "to have compulsory process to compel the attendance of witnesses in his behalf."

Consistent with ***Rock***, this Court has "affirm[ed] that a criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶ 39, 263 Wis. 2d 434, 666 N.W.2d 485.

In this case, Mr. Lagrone asserts that he had a state and federal constitutional right to testify at the mental responsibility phase ("second phase") of his bifurcated criminal proceeding, and the circuit court erred by failing to conduct an on-the-record colloquy regarding his waiver of the right to testify. Consequently, Mr. Lagrone is entitled to an evidentiary hearing regarding whether his waiver of the right to testify was knowing and intelligent.

B. Standard of review.

Whether the right to testify applies at the second phase of a bifurcated criminal proceeding and can be waived in the absence of a personal, on-the-record colloquy requires an application of constitutional principles, and is thus reviewed independently. ***Weed***, 263 Wis. 2d 434, ¶ 12; ***State v. Denson***, 2011 WI 70, ¶ 47, 335 Wis. 2d 681, 799 N.W.2d 831.

C. The evolution of Wisconsin law governing bifurcated criminal proceedings reflects that a defendant has a constitutional right to testify at the second phase.

In 1967, in ***State ex rel. La Follette v. Raskin***, this Court established a bifurcated procedure when an individual alleges he or she is not guilty of criminal conduct by reason of mental disease or defect. 34 Wis. 2d 607, 614, 150 N.W.2d 318 (1967). ***Raskin*** addressed a statute that, at the time, established that pleas of not guilty and pleas of not guilty by reason of insanity were to be tried together, not separately. ***Id.***

at 614-18. ***Raskin*** held that in order for the statute to conform to due process, a defendant was entitled to a sequential order of proof on the issue of guilt and insanity so that inculpatory statements in a compulsory mental examination would not be divulged to the jury before guilt was determined. ***Id.*** at 623-27.

Raskin's bifurcated trial process was subsequently codified in Wis. Stat. § 971.175. In 1987, the legislature replaced Wis. Stat. § 971.175 with Wis. Stat. § 971.165, which maintained "the basic bifurcated trial procedure with its sequential order of proof as first established in ***Raskin***." ***State v. Murdock***, 2000 WI App 170, ¶ 23, 238 Wis. 2d 301, 617 N.W.2d 2d 175. Section 971.165 provides for a "continuous trial" with two separate phases:

> (1) If a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect:
>
> (a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

Wis. Stat. § 971.165(1)(a). Mental disease or defect excluding responsibility is an affirmative defense, which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence. Wis. Stat. § 971.15(3).

In 1988, in ***State v. Koput***, this Court held that a unanimous jury verdict was not required at the second phase of a bifurcated proceeding. 142 Wis. 2d 370, 418 N.W.2d 804 (1988). ***Koput*** emphasized that the phases of a bifurcated trial serve different purposes—the first phase settles the issue of criminal guilt, while the second phase is dispositional in nature. ***Id.*** at 388-90. Thus, because the second phase is

dispositional in nature and has a different burden than the first phase, ***Koput*** found that a unanimous verdict was not required. ***Id.*** at 397-98.

Subsequently, in ***Murdock***, the defendant argued, based on ***Koput***, that the second phase was not a part of a criminal trial, thus, a criminal jury trial waiver statute was inapplicable at the second phase. 238 Wis. 2d 301, ¶ 17. The court of appeals rejected this argument, finding that ***Koput*** "did not clearly establish that the responsibility phase is sufficiently removed from the overall criminal proceedings…" ***Id.***, ¶ 20. ***Murdock*** quoted ***Koput's*** statement that:

> [c]learly, at one time when the burden of proving sanity was on the state and a unanimous finding of sanity was required, the "proceeding" was criminal. Hence, to some degree, in its ancestry at least, it is not completely divorced juris-genetically from its antecedents. *We, therefore, will not denominate it a civil proceeding. Rather, it is a special proceeding in the dispositional phase of a criminal proceeding*-a proceeding that is not criminal in its attributes or purposes.

Id., ¶ 20 (citing ***Koput***, 142 Wis. 2d at 397). ***Murdock*** then concluded that:

> [w]hile Koput suggests that, in Wisconsin, the mental responsibility phase could have evolved as an entirely separate proceeding from the guilt phase, the fact remains that it has not. The statutes governing the procedures for trying pleas of not guilty by reason of mental disease or defect have kept the responsibility phase and guilt phase attached in procedure even as they are detached in nature and purpose.

Id., ¶ 24. Thus, ***Murdock*** held that the criminal jury trial waiver statute at issue was applicable to the second phase. ***Id.***, ¶ 29.

The following year, in ***State v. Langenbach***, the court of appeals held that the Fifth Amendment privilege against self-incrimination applied at the second phase of a bifurcated criminal proceeding. 2001 WI App 222, ¶¶ 1, 20, 247 Wis. 2d 933, 634 N.W.2d 916. Significantly, as in ***Murdock***, the court found it "important that the legislature has not separated the proceedings for the determinations of guilt and mental responsibility, as ***Koput*** suggests it could have." ***Id.***, ¶ 19. ***Langenbach*** explained:

> [t]he statute setting forth the procedures for both the guilt phase and the responsibility phase is a part of the chapter on criminal procedure and a defendant can only be found not guilty by reason of mental disease or defect if he or she first admits to the criminal conduct or is found guilty. While we agree that ***Koput*** explains that the decision made in the mental responsibility phase is not criminal in nature, *the fact is that the mental responsibility phase remains a part of the criminal case in general.* As such, [the defendant] is entitled to invoke his Fifth Amendment privilege at the mental responsibility phase without penalty.

Id., ¶ 19 (citations omitted) (emphasis added).

As ***Murdock*** and ***Langenbach*** concluded, while the nature of the two phases may be different, the second phase remains a "part of the criminal case." Thus, given that the second phase is a part of a criminal case and the right to testify is a fundamental component of the criminal justice system, the right to testify must apply at the second phase. *See* ***Rock***, 483 U.S. at 52; ***Weed***, 263 Wis. 2d 434, ¶ 39.

Moreover, ***Langenbach's*** holding that the Fifth Amendment privilege against self-incrimination applies at the second phase supports that the right to testify also applies. In ***Rock***, the United States Supreme Court stated that the right to testify is a "necessary corollary" to the Fifth Amendment's guarantee against self-incrimination. 483 U.S. at 52; ***Denson***, 335 Wis. 2d 681, ¶ 49. ***Rock*** described the relationship between the right to testify and the privilege against self-incrimination as follows:

> [t]he opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In ***Harris v. New York***, 401 U.S. 222 (1971), the Court stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." ***Id.*** at 225. Three of the dissenting Justices in that case agreed that the Fifth Amendment encompasses this right: "[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right to 'remain silent unless he chooses to speak in the unfettered exercise of his own will.'…The choice of whether to testify in one's own defense…is an exercise of the constitutional privilege." ***Id.*** at 230, quoting ***Mallory v. Hogan***, 378 U.S. 1, 8 (1964). (Emphasis removed).

483 U.S. at 52-53. Thus, given the strong connection between the right to testify and the privilege against self-incrimination, the right to testify must also apply at the second phase. As the United States Supreme Court noted in ***Rock***, the right to testify is essential to preserving dignity and autonomy; if an individual is deprived of "an opportunity to be heard," he or she has not been afforded "her day in court." 483 U.S. at 51.

In addition, the absence of a constitutional right to a NGI plea does not preclude a finding that an individual has a fundamental constitutional right to testify at the second phase.

See ***State v. Francis***, 2005 WI App 161, ¶ 1, 285 Wis. 2d 451, 701 N.W.2d 632 (finding that a colloquy is not required when a defendant abandons a NGI plea). Despite the absence of a constitutional right to a NGI plea, case law reflects that once a bifurcated proceeding commences, individuals still possess constitutional rights at the second phase. *See* ***Langenbach***, 247 Wis. 2d 933, ¶ 19 (holding that the privilege against self-incrimination applies to the second phase); ***State v. Morgan***, 195 Wis. 2d 388, 442-45, 536 N.W.2d 425 (1995) (analyzing whether an individual's constitutional right to present a defense in the second phase was violated, thus implying that the right to present a defense exists at the second phase).

D. A circuit court is required to conduct a personal, on-the-record colloquy regarding the waiver of the right to testify at the second phase of a bifurcated criminal proceeding.

In ***State v. Weed***, this Court mandated that circuit courts conduct a personal, on-the-record colloquy regarding the waiver of a defendant's right to testify at a criminal trial in order to ensure that his waiver is knowing and voluntary. 2003 WI 85, ¶ 40. This simple but personal colloquy was designed to ensure that (a) the defendant is aware of his or her right to testify and (b) the defendant has discussed this right with counsel. ***Id***, ¶ 43. ***Weed*** recognized that the decision to testify is so fundamental that it requires an "intentional relinquishment or abandonment" of the right. ***Id.***, ¶ 40.

Because, as discussed above, individuals have a fundamental constitutional right to testify at the second phase of a bifurcated criminal proceeding, circuit courts must conduct a personal, on-the-record colloquy regarding the right to testify, pursuant to ***Weed***.

Conducting an on-the-record colloquy is the "clearest and most efficient means" of ensuring that a defendant is aware of a right and is validly waiving the right. *See* ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (requiring a colloquy for a waiver of the right to counsel); *see also* ***State v. Anderson***, 2002 WI 7, ¶¶ 23, 29, 249 Wis. 2d 586, 638 N.W.2d 301 (requiring a colloquy for a waiver of a trial by jury). Colloquies are also beneficial in that they are a means of "preserving and documenting" a valid waiver for the purposes of appeal and postconviction motions. ***Klessig***, 211 Wis. 2d at 206.

Moreover, as this Court found in ***Weed***, requiring circuit courts to conduct a colloquy regarding the waiver of the right to testify at the second phase of a bifurcated criminal proceeding is not "significantly burdensome." 2003 WI 85, ¶ 42. For guidance, circuit courts can use the already-existing jury instruction regarding the right to testify—Wis JI-Criminal SM-28. Wis JI-Criminal SM-28 directs a circuit court to ask the following questions to a defendant:

> "Do you understand that you have a constitutional right to testify?"
>
> "And do you understand that you have a constitutional right <u>not</u> to testify?"
>
> "Do you understand that the decision whether to testify is for you to make?"
>
> "Has anyone made any threats or promises to you to influence your decision?"
>
> "Have you discussed your decision whether or not to testify with your lawyer?"
>
> "Have you made a decision?"
>
> "What is that decision?"

Wis JI-Criminal SM-28.

In addition, a colloquy regarding the waiver of the right to testify at the second phase of a bifurcated criminal proceeding is especially necessary given that individuals pursuing a NGI defense may be suffering from a mental illness or a mental defect that could interfere with their memory or their ability to understand legal principles. For example, in this case, trial counsel requested a competency evaluation of Mr. Lagrone two times. While Mr. Lagrone was found competent both times, Dr. Rawski noted that Mr. Lagrone "has difficulties recalling dates, durations and some chronological history..." (*Id.*). Additionally, Dr. Deborah L. Collins "urge[d] court officers to remain sensitive in the event of any significant changes in Mr. Lagrone's overall mental status and or compliance with psychiatric treatment. Such changes may signal fluctuations in his competency and warrant his re-examination." (20:6).

Thus, a colloquy regarding the waiver of the right to testify at the second phase of the bifurcated trial would have ensured that Mr. Lagrone was aware of the right to testify and was knowingly waiving the right. As the State conceded in ***Weed***, colloquies are "beneficial to the criminal justice system." 2003 WI 85, ¶ 42.

E. Mr. Lagrone is entitled to an evidentiary hearing because the circuit court failed to conduct an on-the-record colloquy regarding the waiver of the right to testify at the second phase of the bifurcated criminal proceeding.

In ***State v. Garcia***, the court of appeals held that when a circuit court fails to conduct a colloquy regarding the waiver of the right to testify the remedy is an evidentiary hearing. 2010 WI App 26, ¶ 4, 323 Wis. 2d 531, 779 N.W.2d 718. An evidentiary hearing is also the remedy where a circuit court fails to conduct a colloquy regarding the right to a jury trial or the right to counsel or when there is a plea colloquy deficiency. ***Id***., ¶ 9 (citing ***Klessig***, 211 Wis. 2d at 206 (right to counsel); ***Anderson***, 249 Wis. 2d 586, ¶ 23 (right to trial by jury); ***State v. Bangert***, 131 Wis. 2d 246, 270-72, 389 N.W.2d 12 (1986) (waiver of multiple constitutional rights by entry of guilty or no contest plea)).

Under ***Garcia***, to obtain an evidentiary hearing a defendant must file a motion alleging that (1) there was no colloquy, and (2) he did not understand that he had a right to testify. 323 Wis. 2d 531, ¶¶ 9, 14. The burden then shifts to the State to show that the defendant's waiver of the right to testify was nonetheless knowing and voluntary. ***Id.***

In this case, an evidentiary hearing is required. At no point did the circuit court confirm that Mr. Lagrone understood that he had a right to testify at the second phase of the bifurcated criminal proceeding. Additionally, Mr. Lagrone properly alleged in his postconviction motion that he did not understand that he had a right to testify at the second phase. (34; App. 114-18).

In its decision, the court of appeals noted that:

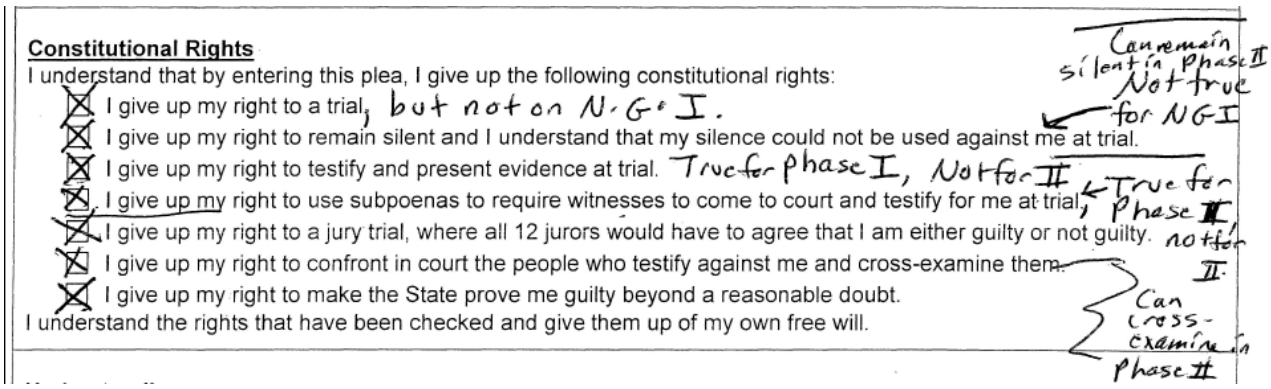
> While [Mr. Lagrone's] motion asserted that he did not understand that he had the right to testify at the second phase of the NGI proceeding, there was no affidavit explaining that he did not understand that he could have testified at the second phase of the proceeding.

(Slip op. ¶ 18; App. 109). However, it unclear how these two allegations are different. Alleging that Mr. Lagrone did not understand he had the right to testify at the second phase is the same as alleging he did not understand he could have testified at the second phase.[3]

Moreover, while the plea questionnaire submitted in the first phase states "I give up my right to testify and present evidence at trial" followed by the handwritten phrase "True for Phase I, Not for II", this does not provide a basis to deny Mr. Lagrone an evidentiary hearing. Rather, the handwriting on the plea questionnaire supports the need for an evidentiary hearing to obtain testimony from Mr. Lagrone and his trial attorney.

[3] Undersigned counsel did not attach an affidavit from Mr. Lagrone to the postconviction motion because under Wis. Stat. § 802.05(1): "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit."

The relevant portion of the plea questionnaire is as follows:



Constitutional Rights

I understand that by entering this plea, I give up the following constitutional rights:

- [X] I give up my right to a trial, but not on N.G.I.
- [X] I give up my right to remain silent and I understand that my silence could not be used against me at trial.
- [X] I give up my right to testify and present evidence at trial. True for phase I, Not for II
- [X] I give up my right to use subpoenas to require witnesses to come to court and testify for me at trial.
- [X] I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty.
- [X] I give up my right to confront in court the people who testify against me and cross-examine them.
- [X] I give up my right to make the State prove me guilty beyond a reasonable doubt.

I understand the rights that have been checked and give them up of my own free will.

Can remain silent in phase II Not true for NGI

True for Phase II not for II.

Can cross-examine in Phase II

(21:1; App. 119).

First, the statement "I give up my right to testify at trial and present evidence at trial" references two constitutional rights—the right to testify and the right to present evidence at trial. It is unclear whether the handwritten phrase "True for Phase I, Not for II," refers to only one or both rights.

Second, the meaning of "True for Phase I, Not for II," is ambiguous. This phrase could mean that Mr. Lagrone is giving up his right to testify at the first phase, but not giving up the right to testify at the second phase. Alternatively, this phrase could be interpreted to mean that Mr. Lagrone has a right to testify at the first phase, but does not have a right to testify at the second phase. The ambiguity of this phrase is exemplified by an examination of some of the other handwritten references. For example, the plea questionnaire notes in handwriting that Mr. Lagrone "*can* remain silent in Phase II," and "*can* cross-examine in Phase II." In contrast, nowhere on the plea questionnaire does it say that Mr. Lagrone "*can* testify in Phase II."

Third, as noted above, regardless of the meaning of "True for Phase I, Not for II," the circuit court never specifically confirmed at any point that Mr. Lagrone understood that he was giving up the right to testify at the second phase.

In addition, contrary to the court of appeals' suggestion (Slip op. ¶ 18; App. 109), Mr. Lagrone was *not* required to provide an offer of proof regarding the content of his testimony or how the testimony would have affected the trial's outcome. Mr. Lagrone was only required to allege that he did not understand the right to testify pursuant to ***Garcia.*** 323 Wis. 2d 531, ¶ 9. ***State v. Winters***, cited by the court of appeals, is inapposite. (Slip op. ¶ 18; App. 109 (citing ***Winters***, 2009 WI App 48, ¶¶ 14-19, 317 Wis. 2d 401, 766 N.W.2d 754)).

In ***Winters***, the defendant elected to waive his right to testify at trial. ***Id***., ¶ 7. The circuit court conducted a colloquy to ensure that the defendant was waiving his right to testify knowingly, voluntarily, and intelligently. ***Id.*** The defendant told the court that he decided to voluntarily waive his right to testify and that he had discussed this decision with his lawyer. ***Id.*** However, the following day, after the State released its rebuttal witnesses, the defendant changed his mind and wanted to testify. ***Id***., ¶¶ 8-11. The circuit court denied the defendant's request. ***Id***., ¶ 12. On appeal, the defendant argued in part that the circuit court erred in refusing to allow him to revoke his waiver of the right to testify. ***Id***., ¶ 13. ***Winters*** denied the defendant relief on the basis that he did not provide an offer of proof at the time of trial or in his postconviction motion regarding the details of his testimony. ***Id***., ¶¶ 15, 24. However, ***Winters*** explicitly noted that the defendant was *not* "challenging the colloquy wherein he knowingly, voluntarily, and intelligently waived his right to

testify" and "[t]here is no dispute that [the defendant's] waiver…constituted a valid waiver of his fundamental constitutional right to testify on his own behalf." ***Id***., ¶ 15.

Given that Mr. Lagrone *is* challenging the absence of a colloquy, ***Winters*** is inapposite. Mr. Lagrone never knowingly, voluntarily, and intelligently waived his right to testify at the second phase.

Therefore, because the circuit court failed to conduct an on-the-record colloquy regarding the waiver of the right to testify at the second phase, and Mr. Lagrone properly alleged that he did not understand that he had the right to testify at the second phase, he is entitled to an evidentiary hearing.

II. The Harmless Error Doctrine Does Not Apply When a Circuit Court Fails to Conduct a Personal, On-the-Record Colloquy Regarding the Waiver of the Right to Testify.

A. Standard of review.

Whether the harmless error doctrine applies is a question of law reviewed independently. ***State v. Travis***, 2013 WI 38, ¶ 9, 347 Wis. 2d 142, 832 N.W.2d 491.

B. The harmless error doctrine does not apply when a circuit court fails to conduct a personal, on-the-record colloquy regarding the waiver of the right to testify.

In this case, pursuant to ***Garcia***, Mr. Lagrone filed a postconviction motion requesting an evidentiary hearing on the grounds that the circuit court failed to conduct a colloquy and that he did not understand that he had a right to testify. 2010 WI App 26, ¶¶ 9, 14.

However, the court of appeals' decision denying Mr. Lagrone an evidentiary hearing ignored ***Garcia***, and instead erroneously applied the harmless error doctrine based on ***State v. Nelson***, 2014 WI 70, 355 Wis. 2d 722, 849 N.W.2d 317.[4]

In ***Nelson***, the Wisconsin Supreme Court examined whether a circuit court's denial of a defendant's assertion of her right to testify was amendable to harmless error analysis.

The defendant in ***Nelson*** informed the circuit court she wanted to testify at her trial on child sexual assault charges. ***Id***., ¶¶ 12, 14. The circuit court engaged her in a colloquy regarding the waiver of her right not to testify. ***Id***., ¶ 14. The circuit court also asked her about the substance of her testimony. ***Id.***, ¶ 15. The defendant stated that she "'want[ed] to tell what actually happened.'" ***Id.*** She further stated that she wanted to testify that she did not unbuckle the child's pants and that the assaults did not happen three days in a row contrary to the alleged victim's testimony. ***Id.*** The court responded that the testimony had no bearing on the elements of the offense, and "made sure that Nelson's attorney had expressed to Nelson that 'it wouldn't be a good idea' for Nelson to testify." ***Id***. The circuit court then found that the defendant was not "'intelligently and knowingly waiving her right against self-incrimination because she wants to testify to things that are completely irrelevant…'" ***Id***., ¶ 16. The defendant appealed, arguing that the circuit court violated her

[4] This Court accepted review of ***State v. Nelson***, 2012AP2140-CR, unpublished slip op. (WI App Sept. 4, 2013), while Mr. Lagrone's case was in briefing in the court of appeals. After this Court issued a decision in ***State v. Nelson***, 2014 WI 70, 355 Wis. 2d 722, 849 N.W.2d 317, Mr. Lagrone and the State filed replacement briefs discussing ***Nelson's*** applicability.

constitutional right to testify on her own behalf and, therefore, a new trial was required. ***Id***., ¶ 17.

This Court assumed, without deciding, that the circuit court erred. ***Id***., ¶¶ 21, 27. However, this Court concluded that the denial of the defendant's right to testify was subject to harmless error review "because its effect on the outcome of the trial is capable of assessment." ***Id***., ¶¶ 5, 52.

In contrast to this case, the issue in ***Nelson*** was the erroneous denial of a defendant's assertion of a known right. ***Nelson*** did not address the circuit court's failure to conduct a colloquy regarding the waiver of a right. This distinction is significant for two reasons.

First, because there was a colloquy in ***Nelson***, the decision did not examine or address the procedure for waiving the right not to testify. Thus, ***Nelson*** did not overrule or modify Wisconsin cases requiring an evidentiary hearing when a colloquy is absent or invalid. *See* ***Garcia***, 2010 WI App 26, ¶ 9; *see also* ***Denson***, 335 Wis. 2d 681, ¶¶ 66, 68-70, (declining to require a colloquy regarding the right not to testify, but stating that a circuit court "must" hold an evidentiary hearing when a defendant properly raises the issue of an invalid waiver of the right not to testify).

Second, in ***Nelson***, the defendant informed the circuit court what she planned to say on the stand. Thus, there was some basis to make a harmless error determination. *See* ***Nelson***, 355 Wis. 2d 722, ¶¶ 5, 15, 52 ("We conclude that harmless error review applies to the circuit court's alleged denial of Nelson's right to testify because its effect on the outcome of the trial is capable of assessment."). In contrast, here, there were no statements on the record indicating what Mr. Lagrone would testify to and the State, therefore, cannot meet its burden of proving the error was harmless.

In order for an error to be harmless, the State, as the party benefiting from the error, must prove that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Id.***, ¶ 44 (quotations omitted).

The court of appeals' decision in this case acknowledges that it is the State's burden to prove that an error was harmless. (Slip op. ¶ 18; App. 108-109). However, the decision then finds that the State has met its burden because *Mr. Lagrone* did not challenge the sufficiency of the evidence and did not provide an offer of proof regarding the content of his testimony. (***Id.***). By requiring that Mr. Lagrone challenge the sufficiency of the evidence or provide an offer of proof regarding the content of his testimony, the court of appeals' decision erroneously shifts the burden from the State to Mr. Lagrone.

Moreover, whether an error is harmless is a distinct inquiry from the sufficiency of the evidence. "Time and time again, the [United States] Supreme Court has emphasized that a harmless error inquiry is not the same as a review for whether there was sufficient evidence at trial to support a verdict." ***Mark D. Jensen v. Marc Clements***, ___, F.3d ___ (7th Cir. 2015). In ***Kotteakos v. United States***, 328 U.S. 750 (1946), the United States Supreme Court explained its harmless error analysis as:

> And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had on the jury's decision….The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Id., at 764-66; *see also* ***Satterwhite v. Texas***, 486 U.S. 249, 258-59 (1988); ***Sullivan v. Louisiana***, 508 U.S. 275, 279 (1993); ***Fahy v. State of Conn.***, 375 U.S. 85, 86 (1963). Thus, by requiring Mr. Lagrone to challenge the sufficiency of the evidence in order to prevail, the court of appeals' decision misunderstands harmless error analysis.

In addition, in analogous contexts this Court has not applied the harmless error doctrine. In ***Denson***, which involved the waiver of the right not to testify, this Court stated in a footnote that the "harmless error rule has no application to this case":

> Denson also argues that a circuit court's complete failure to engage a criminal defendant in an on-the-record colloquy regarding his or her right not to testify should not be subject to harmless error analysis. *However, the harmless error rule has no application to this case.* The harmless error rule prohibits reversal for errors, even constitutional ones, not affecting a party's substantial rights. As a preliminary matter, we have concluded that a circuit court does not err by failing to engage a criminal defendant in an on-the-record colloquy regarding his or her right not to testify. *More to the point, however, the State does not argue, and we do not adopt, the position that a circuit court's failure to conduct such a colloquy is harmless.* Rather, we conclude that whether or not a circuit court conducts an on-the-record colloquy, once a defendant properly raises in a postconviction motion the issue of an invalid waiver of the right not to testify, *the circuit court must conduct an evidentiary hearing to determine whether the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify*.

Id., 335 Wis. 2d 681, ¶ 69 n. 13 (citations omitted) (emphasis added).

Similarly, this Court has also stated that the harmless error doctrine does not apply in the context of a ***Bangert*** plea withdrawal claim.[5]

In ***State v. Taylor***, the defendant sought plea withdrawal pursuant to ***Bangert*** on the basis that he was incorrectly advised during his plea colloquy that the maximum penalty was only six years in prison. 2013 WI 34, ¶¶ 16, 18, 347 Wis. 2d 30, 829 N.W.2d 482. On appeal, both the defendant and the State agreed that the harmless error doctrine should not be applied. ***Id.***, ¶ 40. In particular, the State indicated that "no case has ever applied the harmless error doctrine to the ***Bangert*** framework…" ***Id***. This Court agreed, and denied plea withdrawal on other grounds. ***Id.***, ¶¶ 8, 28, 34, 40, 42-43.

While ***Taylor*** did not involve a circuit court's failure to conduct a colloquy regarding the waiver of the right to testify, it is similar in that it involved a circuit court's failure to comply with a mandatory duty (the duty to advise a defendant of the maximum penalty) and a defendant's allegation that he did not understand the missing information. Thus, if the harmless error doctrine does not apply when a circuit court

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[5] ***Bangert*** was referenced in both ***Garcia*** and ***Denson***. *See* ***Garcia***, 323 Wis. 2d 531, ¶ 9; ***Denson***, 335 Wis. 2d 681, ¶¶ 56, 68, 70. Akin to the procedure in ***Garcia***, under ***Bangert***, a defendant may move to withdraw his plea when a circuit court fails to comply with statutory or other mandatory duties. 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). A defendant is entitled to an evidentiary hearing if: (1) the motion makes a *prima facie* showing that the plea was accepted without the trial court's conformance with statutory or other mandatory duties; and (2) the motion alleges that the defendant did not know or understand the information that should have been provided at the plea colloquy. ***Id.*** The burden then shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, voluntary, and intelligent, despite the deficiencies in the plea hearing. ***Id.*** at 274-75.

fails to comply with a mandatory duty during a plea hearing, the harmless error doctrine should not apply when a circuit court fails to conduct a colloquy regarding the waiver of the right to testify.

Therefore, because the circuit court in this case failed to conduct a colloquy regarding the waiver of the right to testify and Mr. Lagrone properly alleged that he did not understand that he had a right to testify at the second phase, this case is properly analyzed under ***Garcia***, and Mr. Lagrone is entitled to an evidentiary hearing.

CONCLUSION

For the reasons stated, Mr. Lagrone respectfully requests that this Court reverse the court of appeals' decision and remand this case to the circuit court with directions to hold an evidentiary hearing regarding the waiver of his right to testify at the second phase.

Dated this 16th day of October, 2015.

Respectfully submitted,

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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 7,730 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 16th day of October, 2015.

Signed:

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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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

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Page