STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP000234 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVAIL L. LEWIS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court,
the Honorable Michael J. Hanrahan, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Were Mr. Lewis' Fourth Amendment rights violated when officers seized him based on the positioning of his arms during the canvassing of an area 10 minutes after a report of "shots fired"?

Officers were dispatched to 4877 West Fond du Lac Avenue for "shots fired" and three fleeing suspects. As police were canvassing the area 10 minutes after the initial dispatch, officers saw Mr. Lewis walking. Officers only saw Mr. Lewis from behind and did not actually see his hands, but observed his elbows "popped out" to his sides and believed he was potentially holding his waistband. Officers then further reasoned that he was possibly holding a weapon in his waistband. Mr. Lewis was alone, he did not match a description of any suspect (with the exception of being a black male, as one of the three suspects), he was not sweaty, and he was not out of breath. Officers did not cite any behavior on the part of Mr. Lewis beyond the perceived significance of his suspected hand position as grounds for the seizure. Officers drew their weapons, ordered Mr. Lewis to put his hands up, and asked if he was armed. Mr. Lewis cooperated and informed officers he had a handgun.

The circuit court found that the seizure and subsequent discovery of the firearm was lawful.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be welcomed if it would be helpful to the court. Publication is not warranted, as this is a fact-specific case requiring the application of established legal principles.

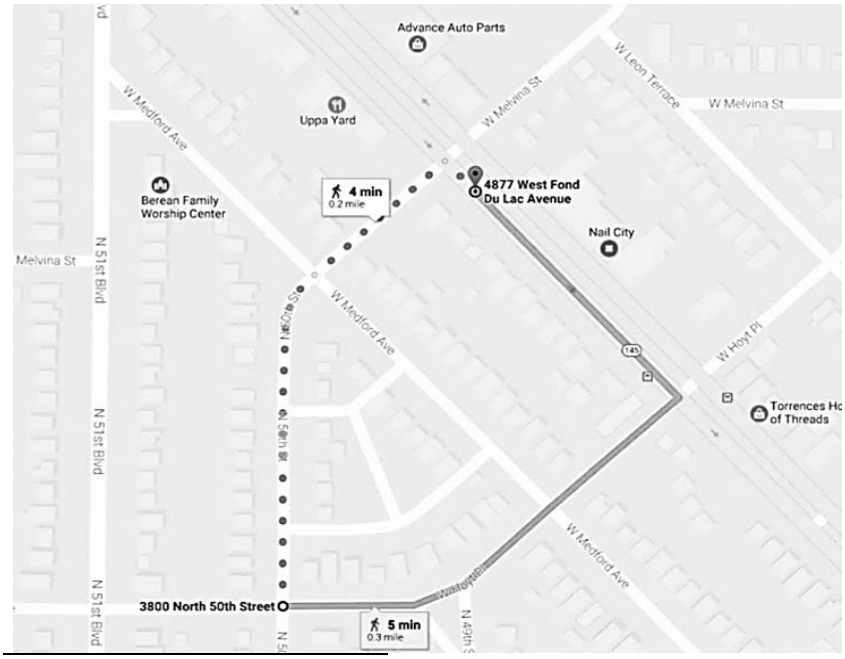
STATEMENT OF CASE AND FACTS

On July 27, 2014, Mr. Lewis was charged with one misdemeanor count of carrying a concealed weapon, namely a handgun, in violation of Wis. Stat. § 941.23(2). Mr. Lewis filed a pretrial suppression motion asserting that police lacked reasonable suspicion for the seizure. (3:1). The State filed a response, and the circuit court held an evidentiary hearing. [1] (9, 34). The following was elicited:

On the afternoon of July 24, 2014, Milwaukee Police Officers Robert Crawley and his partner, Randy Wesley, were dispatched to the area of 3800 North 50th Street in Milwaukee at 1:37 p.m. for "shots fired." (34:6, 12, 16; App. 106, 112, 116). Three suspects were "fleeing southbound." (34:6, 16; App. 106, 116). One of the subjects was reportedly a black male "wearing red shorts and a white t-shirt with a design on the front that [said] 'shoot it.'" (34:8; App. 108). Officer Crawley testified that they "retrieved several messages of several different actors" from dispatch, but he did not indicate that they had any information about the race, gender, clothing, or general appearance of the other two subjects. (Id.) Officer Crawley did not interview any of the witnesses. (34:14; App. 114). Officers were told that the suspects were seen "running on Fond du Lac passing Melvina." (34:9; App. 109).

[1] The Honorable Judge Tom Wolfgram heard and ruled on the motion. (34:1; App. 101). The Honorable Judge Michael Hanrahan also heard the testimony as part of judicial training. (37:3). Judge Hanrahan presided over Mr. Lewis' case after the suppression motion proceedings. (35, 36, 37, 38, 39).

Ten minutes later, at 1:47 p.m., Officers Crawley and Wesley observed Mr. Lewis from behind, walking through an alley in the area of 4877 West Fond du Lac Avenue. (34:6, 15, 17; App. 106, 115, 117). A map of the area is below: [2]



[2] There was confusion in the circuit court about the relationship between where the alleged shots occurred and where the three suspects were seen. Officer Crawley testified that the dispatch was for "shots fired in the area of 3800 North 50th Street," which is just south of the alley where Mr. Lewis was. (34:6; App. 106). Officer Crawley also testified that the subjects were "running on Fond du Lac passing Melvina," which is just north of where Mr. Lewis was. (34:4, 9; App. 104, 109). The trial court attempted to cure the confusion by finding that Mr. Lewis was found "in an area where the person would have reasonably gotten in that amount of time from the location of the shots fired description." (34:30; App. 130). However, it is undisputed that the suspects were running southbound, either from 3800 North 50th Street or from the area of Fond du Lac Avenue and Melvina. Therefore, for Mr. Lewis to have been one of these suspects running southbound ten minutes earlier, he would have had to been running southbound only to have looped back around, on his own, to once again commence walking calmly southbound in the alleyway of 4877 West Fond du Lac Avenue.

The area is densely populated and largely residential. (34:12-13; App. 112-13). There is no indication in the record that this was a particularly high-crime area beyond the circumstance officers were investigating at that time.

Mr. Lewis was wearing blue jeans. (34:15; App. 115). He was not sweaty or out of breath, and there was no testimony that he was looking around as though he was either on the lookout or concerned about police attention. (Id.). According to Officer Crawley, Mr. Lewis' arms were "sticking out" and he agreed with trial counsel's characterization that "his elbows…popped out…like chicken wings." (34:18; App. 118). Officers could not actually see his hands because they only viewed him from behind. (Id.). Officer Crawley could not recall whether Mr. Lewis was wearing a belt, but testified that he "appeared to be holding up his pants sort of like he was holding something up." (34:4-5, 10; App. 104-105,110). Officer Crawley believed that meant that Mr. Lewis was "trying to hide an object" from police and further deduced, based on his training and experience, that this object was potentially a weapon. (34:5, 10; App. 110). However, officers did not see any weapons, holster, or bulges. (34:11; App. 111).

Both officers drew their guns. (34:12; App. 112). Officer Crawley instructed Mr. Lewis to stop and show his hands, and he asked Mr. Lewis if he was armed. (34:5, 11; App. 105, 111). Officer Crawley did not know Mr. Lewis, and was unaware of whether he was a felon or held a concealed/carry permit. (34:11; App. 111). Mr. Lewis was compliant and cooperative with officers' commands. (34:15; App. 115). Mr. Lewis told officers he had a concealed handgun. (34:5; App. 105). Mr. Lewis did not have a permit for carrying a concealed weapon and the gun was recovered

"from the same location that he was holding." (34:5, 17; App. 105, 117).

There is no indication in the record or in public CCAP records that Mr. Lewis was charged with any offense related to the report of "shots fired."

At the hearing on Mr. Lewis' suppression motion, trial counsel argued that Mr. Lewis was seized and that there was no reasonable and articulable suspicion to justify the seizure. (34:27; App. 127).[3] Trial counsel emphasized the lack of "individualized, particularized suspicion as it relate[d]to Mr. Lewis." (34:28; App. 128). The State argued that officers effectuated a "reasonable and brief stop" and that if Mr. Lewis had not had a gun, "this would have been a conversation with him" and he "would have been on his way." (34:19; App. 119). The State further argued that when officers have reasonable suspicion, they may "freeze the scene until they know what is going on," emphasizing officer safety. (34:19-21; App. 119-21).

Following testimony and argument, the circuit court found that Mr. Lewis was walking behind 4877 West Fond du Lac in such a manner that the officer reasonably believed he may have been holding something in the waistband, and that one of the things "he might have been holding reasonably based on his experience [was] a weapon." (34:30; App. 130). The circuit court agreed "he was not free to leave," but that the officers had a reasonable suspicion to seize Mr. Lewis and that the stop was "reasonable" in the totality of the

[3] Trial counsel also argued that ***Miranda*** warnings were required prior to the officers eliciting incriminating statements from Mr. Lewis. (34:28; App. 128). The circuit court rejected that argument. (34:31; App. 131). Mr. Lewis does not advance that argument on appeal.

circumstances, one of which was the timing in relationship to the shots fired complaint. (34:30-31; App. 130-31).

Mr. Lewis filed a motion requesting reconsideration of the circuit court's suppression ruling. (11). The reconsideration motion was argued before Judge Hanrahan, who had been present during the original hearing on the suppression motion but had not issues the original ruling. (37:3). The court declined to reach the merits of Mr. Lewis' motion to reconsider, finding the standard for reconsideration had not been met, relying on ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Inc.***, 2004 WI App 129, 275 Wis. 2d 397, 685 N.W.2d 853. (38:4, 8). Nonetheless, the court opined that "if I had been the judge deciding this case I very well may have decided it the other way, but I am not allowed to do that under the law. I have to follow the law on motions of reconsideration." (38:9).

Mr. Lewis pled guilty to the charged offense of carrying a concealed weapon, in violation of Wis. Stat. § 941.23(2). (39:8). In sentencing Mr. Lewis, the circuit court remarked:

> [A]s the court recalls from the motion hearing … there's no evidence that you were out of breath, that you were sweating. And you know, this --- this was July 24th, that you had been running. There was no evidence that you were looking over your shoulder, looking around, you know, and someone gonna follow me or catch me. You were literally just walking down the alley and there happened to have been shots fired report in the neighborhood…. There really was nothing based on the evidence that I heard that you were doing anything other than walking down the alley during the day. And so the fact that you have no criminal conviction, the fact that you had no offenses since the time of this case which, you know, this was July 2014 so it's almost two years

> we're at, you know, to me it says you're a citizen who's working. You're a guy who's caring for family. These are things we know for sure and I hope that that continues.

(39:14-15). The circuit court sentenced Mr. Lewis to a time-served disposition of seven days in jail and $150 costs. (17; App. 136).

This appeal follows.[4]

ARGUMENT

I. Officers Violated Mr. Lewis' Fourth Amendment Rights When They Seized Him at Gunpoint Without Any Objectively Reasonable Basis to Believe He Was Engaged in Any Criminal Activity.

A. Principles of law and standard of review.

Both the United States and Wisconsin constitutions guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11. "The Fourth Amendment to the United States Constitution is the securing anchor of the right of persons to their privacy against government intrusion." ***State v. Gordon,*** 2014 WI App 44, ¶11, 353 Wis.2d 468, 476, 846 N.W.2d 483.

A police officer may "in appropriate circumstances and in an appropriate manner" stop and briefly detain an individual "if the officer has a reasonable suspicion supported

[4] Wis. Stat. § 971.31(10) permits appeals of an order denying a motion to suppress notwithstanding the fact that judgment was entered pursuant to a guilty plea.

by articulable facts that criminal activity 'may be afoot'." ***Terry v. Ohio***, 392 U.S. 1, 22 (1968); ***United States v. Sokolow***, 490 U.S. 1, 7 (1989). To effectuate a temporary seizure, an officer must have "a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." ***State v. Gammons***, 2001 WI App 36, ¶ 6, 241 Wis. 2d 296, 301, 625 N.W.2d 623, 626.

Reasonableness is not gauged by an officer's "inchoate and unparticularized suspicion or 'hunch'[.]" ***Terry***, 392 U.S. at 27. The test focuses on an objectively reasonable officer and "simple good faith on the part of the arresting officer is not enough." ***State v. Pugh,*** 2013 WI App 12, ¶ 11, 345 Wis. 2d 832, 841-842, 826 N.W.2d 418. "[I]f it were, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." ***Id.***, ¶11 (citing ***Terry,*** 392 U.S. at 22).

"[T]o accommodate public and private interests some quantum of *individualized* suspicion is usually a prerequisite to a constitutional search or seizure." ***Gordon***, 353 Wis.2d 468, ¶12, (quoting ***United States v. Martinez–Fuerte***, 428 U.S. 543, 560 (1976) (emphasis added). "[C]ircumstances must not be so general that they risk sweeping into valid law-enforcement concerns persons on whom the requisite individualized suspicion has not been focused." ***Gordon***, 353 Wis.2d 468, ¶12.

Where an unlawful seizure occurs, the remedy is to suppress the evidence produced. ***State v. Carroll***, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963).

This Court applies a two-part test when reviewing the denial of a motion to suppress. ***State v. Popp***, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471. A circuit court's findings of fact are upheld unless clearly erroneous, but the application of constitutional principles to the facts are reviewed de novo. ***Id***. In the instant case, Mr. Lewis does not challenge the circuit court's factual findings, and therefore, the sole issue is whether the facts supplied reasonable suspicion for the seizure. The burden of proving a temporary detention is reasonable is on the State. ***State v. Pickens***, 2010 WI App 5, ¶ 14, 323 Wis. 2d 226, 235, 779 N.W.2d 1.

B. Application of law to Mr. Lewis' case.

Officer Crawley and his partner came to the area of 3800 North 50th Street in response to a report of "shots fired." Three suspects reportedly fled southbound on Fond du Lac Avenue. (34:3, 16; App. 103, 116). Officers were told one of the three suspects was male, black, and wearing red shorts and a white t-shirt with a design, but the record lacks any description of the other two suspects. (34:8, 9; App. 108-09). Ten minutes after the alleged shots occurred, Mr. Lewis was seized at gun point while walking in a nearby alley. (34:12, 17; App. 112, 117). The only similarity between him and the three suspects was that he, like *one* of the three suspects, is a black male, though his clothing did not match this single described male/black suspect. (34:4, 9, 14-15; App. 104, 109, 114-15). Mr. Lewis was not running, he was not out of breath, and there was no evidence that he was looking around in a suspicious matter. (34:15; App. 115). He was walking alone and *potentially* touched his waistband in a manner such that officers, viewing him from behind, guessed that he was possibly engaged in criminal activity. As described below, this Court's own past interpretation of the Fourth Amendment dictates that these circumstances fall far short of establishing

the individualized reasonable suspicion required under the Fourth Amendment to seize Mr. Lewis.

In ***Gordon,*** officers were driving in a marked squad car in the evening hours when they saw Gordon and two friends walking in the same direction. ***Gordon,*** 353 Wis.2d 468, ¶3. The area was "very well-lit" but was also an "area of high crime" with "a lot of gun violence," where two days earlier a woman had been shot in her car. ***Id.,*** ¶¶3, 9. Officers testified that Gordon looked "nervous" and made a "security adjustment"[5] after recognizing police, touching the outside of his pocket with his hand. ***Id.***, ¶4. Officers saw no bulges in Gordon's jeans, and there was no indication that Gordon or his friends were attempting to flee. ***Id***. Officers noted that Gordon appeared to be too young to lawfully carry a firearm.[6] ***Id.***, ¶5.

Officers approached Gordon and his friends and asked to see their hands. ***Id.***, ¶6. Gordon and his friends complied, and police frisked him, finding a gun, crack cocaine, and marijuana. ***Id.***

This Court found that the circuit court's findings boiled down to three components: (1) the stop occurred in a high-crime area, (2) Gordon "recognized the police presence" and he consequently (3) "patted the outside of his pants pocket." ***Id.***, ¶14. This Court found that these components, "either taken separately or added together, [did] not equal the

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[5] A "security adjustment" was defined as a "conscious or unconscious movement that an individual does when… confronted by law enforcement when they're typically carrying a weapon" in order to verify a weapon is secure. ***Gordon,*** 353 Wis.2d 468, ¶4.

[6] A person must be 21-years old to be eligible for a concealed-carry permit in Wisconsin. Wis. Stat. § 175.60(3)(a) .

requisite objective 'reasonable suspicion' that 'criminal activity' by Gordon was 'afoot.'" ***Id.***

In evaluating the claim that the area in which police encountered Gordon was a "high crime area," this Court emphasized that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." ***Id.*** (citing ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000)). As to the significance of the "security adjustment," this Court also recognized that "many folks, most innocent of any nefarious purpose, may occasionally pat the outside of their clothing to ensure that they have not lost their possessions." ***Id.***, ¶17. This Court emphasized that while additional facts, such as flight or attempted flight, might support objective reasonable suspicion, without such added support, the simple fact of a high crime area and the recognition of a police car were "far too common" to provide the necessary reasonable suspicion to support a stop under the Fourth Amendment. ***Id.***

In ***State v. Pugh,*** this Court also rejected attempts to justify a seizure grounded on the combined factors of "[a]n individual's presence in an area of expected criminal activity" and an accompanying arguably innocent physical gesture. ***Pugh,*** 345 Wis.2d 832, ¶12. In that case, police approached Pugh as he was walking among unlawfully parked cars in the area of a suspected drug house. ***Id.***, ¶3. After officers first discussed the parking matter with Pugh, officers questioned him about the suspected drug house. ***Id.***, ¶¶4-5. After denying any knowledge of the house, Pugh "bladed"[7] himself

[7] "Blading" was explained as follows: "when an individual is concealing a firearm, it creates a bulge, and individuals will commonly (continued)

"with his right side further away" from the officers, prompting law enforcement to seize him. ***Id.***, ¶6. He also "started walking backwards slowly but walking away from[police] backwards." ***Id.***

This Court concluded that the police seizure was unlawful, reaffirming that simple presence in an area of "expected criminal activity" (there, a suspected drug house) does not create a reasonable and particularized suspicion that a person is a criminal. ***Id.***, ¶12. This Court found the "blading" described by officers in ***Pugh*** as unconvincing as the "security check" in ***Gordon*** – "[c]alling a movement that would accompany *any* walking away 'blading' adds nothing to the calculus except a false patina of objectivity." ***Id***.

Just as in ***Gordon*** and ***Pugh***, the *suspected* position of Mr. Lewis' hands does not support individualized reasonable suspicion. Officers saw Mr. Lewis from behind and therefore could only guess that his hands were holding up his waistband. (34:10; App. 110). Officers surmised this meant he was trying to "hide an object" from police, but never testified that Mr. Lewis even saw police prior to commands to stop. (34:3: App. 103). Officers then piled conjecture on conjecture to reason that not only was his hand holding up his waistband, but that his hand was holding up his waistband because there was an item in the waistband, but that this item was a hidden weapon. (34:10; App. 110). However, with only a view from behind of his elbows to the sides, officers would have no way of knowing if Mr. Lewis was typing on his smartphone, picking at a hangnail, or holding up his pants.[8]

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turn that side of their body away to keep that bulge out of view from law enforcement." ***Pugh,*** 345 Wis.2d 832, ¶6.

[8] Judge Hanrahan recognized this during an exchange with the State at a hearing after the suppression motion was denied– "there is a (continued)

Officer Crawley could not recall if Mr. Lewis had a belt. (Id.) There was no visible bulge or holster. (34:11; App. 111). As officers agreed, Mr. Lewis was simply walking with "his elbows … popped out…like chicken wings." (34:18; App. 118). This observation is indistinguishable from the "inchoate and unparticularized suspicion or 'hunch'" found lacking in the ***Terry*** line of cases. ***Terry***, 392 U.S. at 27.

Moreover, even if one takes the leap that officers had a reasonable belief that Mr. Lewis was armed, there was no testimony that he appeared to be someone who did not have legal permission to carry a concealed weapon. The Wisconsin legislature has mandated that it is legal to conceal a weapon in this state. *See* Wis. Stat. § 175.60. As such, even if officers suspect that an individual is armed, that fact alone cannot justify law enforcement exerting force to the degree of raising their own guns towards a member of the community absent some indication that the person is indeed engaged in criminal activity.

That the "shots fired" report occurred 10 minutes earlier does not cure what Mr. Lewis' arm-positioning fails to establish. The shooting suspects had already fled southbound. (34:3, 17; App. 103, 117). Mr. Lewis was not running, sweaty, or out of breath. (34:15; App. 115). There is no evidence in the record that Mr. Lewis matched any description of the fleeing suspects, with the exception of his race and gender, and his clothing did not match. There is no indication in the record that he was looking around suspiciously or attempted to flee.

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style of dress of sagging pants… where people don't wear a belt and have sagging pants. And I am sure…you've seen as the guy runs across the street to catch a bus or something where they – they hold their pants up then with their hands." The State agreed. (37:19-20).

Under no circumstances does Mr. Lewis posit that officers, 10 minutes after an alleged shooting, should not seek to speak to every single person they encounter in the area in search of witnesses or involved parties. Anything short of that would be poor police work. But a report of a shooting does not obliterate Fourth Amendment protections. There remains a requirement of an *individualized* suspicion. As to Mr. Lewis, there was none. As the circuit court acknowledged in sentencing Mr. Lewis, "there really was nothing based on the evidence that I heard that you were doing anything other than walking down the alley during that day." (39:15).

CONCLUSION

Officers lacked an objectively reasonable suspicion to seize Mr. Lewis. This Court should reverse the decision of the circuit court, vacate Mr. Lewis' conviction, and remand with instructions that the circuit court suppress any evidence obtained pursuant to the warrantless seizure.

Dated this 5th day of May, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,582 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 5th day of May, 2017.

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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 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 5th day of May, 2017.

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