STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18 AP 839 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LONNIE P. AYOTTE, JR.,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
DECEMBER 15, 2017, IN THE CIRCUIT COURT
FOR MARQUETTE COUNTY,
THE HONORABLE BERNARD BULT PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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STATEMENT OF THE ISSUES

I. DID THE CIRCUIT COURT ERR WHEN IT HELD THE WARRANTLESS ANALYSIS OF MR. AYOTTE'S BLOOD WAS LAWFUL, WHEN MR. AYOTTE HAD WITHDRAWN HIS CONSENT PRIOR TO THE SEARCH BEING COMPLETED?

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

On April 12, 2016, a deputy with the Marquette County Sheriff's Department arrested Mr. Ayotte for operating with a prohibited alcohol concentration.[1] After the deputy read Mr. Ayotte the Informing the Accused form, Mr. Ayotte submitted to the blood draw.[2] A medical technician drew Mr. Ayotte's blood.[3] The deputy then packaged and mailed the samples to the State Crime Laboratory.[4]

On April 20, 2016, Mr. Ayotte sent a letter to the State Crime Laboratory "asserting his right to privacy in his blood and requests that no analysis be run without a warrant authorizing so[.]"[5] The arresting law enforcement agency and the District Attorney's office also received a copy of Mr. Ayotte's letter.[6] On April 28, 2016, the laboratory disregarded Mr. Ayotte's letter and analyzed the sample.[7] It issued a report, showing a blood alcohol concentration of .032 g/mL.[8]

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[1] R.6.
[2] R.71 at 85–86; R.46.
[3] R.71 at 88; R.47. Mr. Ayotte was subject to a 0.02 prohibited alcohol concentration because of three prior OWI convictions. *See* Wis. Stat. § 340.01(46m)(c).
[4] R.71 at 90; R.47.
[5] R.17.
[6] R.17.
[7] R.71 at 112.
[8] R.71 at 119.

On May 25, 2016, the Marquette County District Attorney's Office charged Mr. Ayotte with operating with a prohibited alcohol concentration, fourth offense.[9] Because the laboratory's analysis of his blood after the revocation of his consent was unlawful, Mr. Ayotte moved to suppress the test result.[10] Mr. Ayotte also moved to suppress all evidence derived from the extension of the traffic stop and his subsequent arrest.[11]

On October 4, 2016, the circuit court, the honorable Bernard Bult presiding, asked both sides to brief the issue of withdrawing consent to testing.[12]

On December 30, 2016, the State filed its briefs.[13] The State argued that in attempting to withdraw his consent, Mr. Ayotte attempted to parse out the analysis of the blood from its seizure.[14]

On January 6, 2017, Mr. Ayotte filed his briefs.[15] He argued the issue of withdrawing consent was analogous to the search of a lawfully-seized cell phone under ***Riley v. California***.[16] In ***Riley***, the Supreme Court ruled that the police must have obtained a warrant to

[9] R.6.
[10] R.17.
[11] R.16. This issue is not appealed here.
[12] R.68 at 22.
[13] R.25.
[14] R.25 at 2.
[15] R.28.
[16] R.29 at 1; ***Riley v. California***, 134 S. Ct. 2473, 2480 (2014).

search the cell phone—though the police had lawfully seized it.[17] Just as a cell phone contains significant private information, which triggers Fourth Amendment protections, so does analyzing an evidentiary blood sample.[18] In addition, Mr. Ayotte argued that at the time he withdrew his consent to the analysis of his blood sample, the search was ongoing or continuous.[19] Under existing caselaw, where a search is ongoing, a person may withdraw his or her consent.[20] Because Mr. Ayotte withdrew his consent to the analysis of the blood sample, the State's analysis could not be justified through consent and was, therefore, unlawful.[21]

On March 14, 2017, the circuit court ruled on Mr. Ayotte's withdrawal of consent motion. When addressing whether Mr. Ayotte retained a privacy interest in his drawn blood, the court stated, "[a]ny expectation of privacy was waived by his consent."[22] It further stated that because Mr. Ayotte submitted to the blood draw, he could not withdraw consent to its analysis.[23] The court took Mr. Ayotte's argument on withdrawing consent as an attempt to parse seizing the

[17] ***Riley***, 134 S. Ct. at 2480.
[18] R.29 at 2–3.
[19] R.29 at 6.
[20] R.29 at 3; ***United States v. Al Dac Ho***, 94 F.3d 932, 933–34 (5th Cir. 1996).
[21] R.29 at 3.
[22] R.32 at 7.
[23] R.32 at 7.

sample from analyzing the sample.[24] In other words, the circuit court believed that Mr. Ayotte made a second search argument.[25] According to the court, such an argument would not prevail under ***Riedel***.[26] The court also declined to compare analyzing the contents of a lawfully seized cell phone to analyzing a lawfully seized blood sample.[27] In the end, it denied Mr. Ayotte's motion.[28]

Mr. Ayotte took the case to trial. On December 14, 2017, a jury convicted Mr. Ayotte for operating with a prohibited alcohol concentration, fourth offense.[29] On the same day, the court sentenced Mr. Ayotte.[30]

On May 1, 2018, Mr. Ayotte appealed his conviction to this Court.[31]

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[24] R.32 at 7.
[25] R.32 at 6–7.
[26] R.32 at 7; *see, e.g.*, ***State v. VanLaarhoven***, 2001 WI App 275, ¶ 16, 248 Wis. 2d 881, 637 N.W.2d 411 (holding that the testing of the defendant's blood was not a second, separate search requiring a warrant).
[27] R.32 at 7.
[28] R.32 at 8.
[29] R.50.
[30] R.71 at 167.
[31] R.64.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN HOLDING THE SEARCH OF MR. AYOTTE'S BLOOD WAS LAWFUL.

A. Standard of Review

Whether a search is valid under the Fourth Amendment is a question of constitutional law reviewed *de novo*.[32] Appellate courts uphold findings of historical fact unless they are clearly erroneous.[33]

B. A person has a legitimate privacy interest in their blood.

A staggering amount of personal information can be acquired by the analysis of a sample of blood. The presence of alcohol, drugs, or other chemicals can be detected; as well as genetic information about ancestry, family connections, medical conditions, gender, pregnancy, and genetic profiles suitable for identification purposes. For these reasons, the United States Supreme Court has recognized that the chemical analysis of a blood sample is an invasion of an individual's privacy.[34]

The United States Supreme Court has consistently recognized an expectation of privacy in the information contained within

[32] ***State v. Guzman***, 166 Wis. 2d 577, 586, 48 N.W.2d 446 (1992).
[33] ***State v. Robinson***, 2010 WI 80, ¶ 22, 327 Wis.2d 302, 786 N.W.2d 463.
[34] ***Skinner v. Ry. Labor Executives' Ass'n***, 489 U.S. 602, 616 (1989).

biological samples—a privacy interest distinct from the collection of the samples in the first place. In the 1989 case ***Skinner v. Railway Labor Executives' Association***, the Court explained:

> [I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of … privacy interests.[35]

In 2001, the United States Supreme Court decided the case of ***Ferguson v. City of Charleston***, where warrantless drug testing was conducted on lawfully-obtained urine samples.[36] Despite the collection of the urine itself being lawful, the Court, citing to ***Skinner***, held that "[T]he urine tests … were *indisputably* searches within the meaning of the Fourth Amendment."[37] The majority opinion states that the analysis of a sample that is lawfully obtained *is* a Fourth-Amendment search.[38]

In ***Birchfield v. North Dakota***, the Supreme Court commented on the information contained in a blood sample, as distinct from a breath sample:

> [A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for

[35] ***Id.***
[36] ***Ferguson v. City of Charleston***, 532 U.S. 67, 73 (2001).
[37] ***Id.*** at 76 (emphasis supplied).
[38] ***Id.*** at 73.

> any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.[39]

The caselaw is unambiguous that individuals have a legitimate and recognized privacy interest in the information contained in their own blood.

The only reasonable interpretation of ***Birchfield***'s discussion of privacy interests is that a person retains his or her privacy interest in the blood sample after it has been extracted from his or her body. Moreover, a person retains that privacy interest indefinitely—as long as the sample is in police possession, the potential for the extraction of personal information from the sample remains.

Conversely, the circuit court concluded Mr. Ayotte did not retain a privacy interest in his blood, stating, "[a]ny expectation of privacy was waived by his consent."[40] Relying upon that assertion, it stated Mr. Ayotte could not rely upon his privacy interest to withdraw his consent to testing.[41] However, the circuit court's holding goes against ***Birchfield***. Under ***Birchfield***, if the *potential* for testing of a blood sample by law enforcement for purposes besides ethanol analysis exists, the anxiety for the subject remains.[42] The circuit

[39] 136 S. Ct. 2160, 2178 (2016).
[40] R.32 at 7.
[41] R.32 at 7.
[42] 136 S. Ct. at 2178.

court's ruling on the issue of withdrawing consent thus failed to account for ***Birchfield***'s position on the privacy interest inherent in blood.

Under existing caselaw, a search occurs for Fourth Amendment purposes whenever the government intrudes upon an individual's "reasonable expectation of privacy."[43] Since Mr. Ayotte had a reasonable expectation of privacy in the information contained in his blood, the analysis of his blood sample was a search.

C. Because analyzing a blood sample is a search under the Fourth Amendment, a person may withdraw consent to the search at any point.

"One who consents to a search 'may of course delimit as he chooses the scope of the search to which he consents.'"[44] When consent, previously given, is modified, limited, or withdrawn, this must be done by an unequivocal act or statement.[45] "Withdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by unequivocal act or statement."[46]

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[43] ***Katz v. United States***, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).
[44] ***State v. Matejka***, 2001 WI 5, ¶ 37, 241 Wis. 2d 52, 621 N.W.2d 891 (*quoting* ***Florida v. Jimeno***, 500 U.S. 248, 252, 111 S. Ct. 1801 (1991)).
[45] ***State v. Wantland***, 2014 WI 58, ¶21, 355 Wis. 2d 135, 848 N.W.2d 810.
[46] ***United States v. Sanders***, 424 F.3d 768, 774 (8th Cir. 2005) (*quoting* ***United States v. Gray***, 369 F.3d 1024, 1026 (8th Cir. 2004)); *see also* ***United States v. Alfaro***, 935 F.2d 64, 67 (5th Cir. 1991); ***Payton v. Commonwealth***, 327 S.W.3d 468, 478 (Ky. 2010).

There is no reason why the search of a blood sample should be treated as categorically different than the search of a cell phone, an automobile, or a dwelling. Consent to an evidentiary chemical blood analysis may be withdrawn, just as one may withdraw consent to any other Fourth-Amendment search. For example, a person might consent to the search of a house but withdraw that consent before the search is completed. As a matter of Fourth Amendment law, it would be unlawful for law enforcement officers to ignore the homeowner withdrawing consent and to remain in the house solely because of the initial, yet retracted, consent.[47]

When the search at issue is the scientific analysis of blood, the duration of the search is typically stretched over days or weeks rather than the minutes or hours that might be involved in the search of a home or automobile. But the relevant time period being longer or shorter does not change the basic legal principles.[48] If a person withdraws his or her consent before the search is completed—whether

[47] *See e.g.* ***United States v. Buckingham***, 433 F.3d 508, 513 (6th Cir. 2006), ***Painter v. Robertson***, 185 F.3d 557, 567 (6th Cir. 1999) (holding that upon a revocation of consent the search should be terminated instantly, and the officers should promptly depart the premises).

[48] *See* ***United States v. Casellas-Toro***, 807 F.3d 380 (1st. Cir. 2015) (where, when the defendant's automobile was searched 21 days after he provided consent, it was held that the search was still justified by the defendant's initial and un-retracted consent).

that is several minutes or several days after consent is initially provided—any search must immediately cease.

In ***Schmerber v. California***, a 1966 United States Supreme Court case that addressed a slew of constitutional challenges to a blood draw in an operating while under the influence case, the Court considered the Fourth Amendment in the context of evidentiary blood draws.[49] The ***Schmerber*** Court found, inter alia, that the Fifth Amendment's right against self-incrimination does not preclude the police from obtaining a blood sample and that the Sixth Amendment did not afford the defendant the right to an attorney prior to the blood sample being collected.[50] But the ***Schmerber*** Court also held that a blood draw *does* fall within the protection of the Fourth Amendment:

> It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment.[51]

The Court then went on to find that the collection of the defendant's blood was a lawful warrantless search because of the existence of exigent circumstances.[52]

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[49] ***Schmerber v. California***, 384 U.S. 757 (1966).
[50] ***Id.*** at 761, 766.
[51] ***Id***. at 767.
[52] ***Id.*** at 770–71.

In Wisconsin, our Supreme Court has very recently affirmed that there is a Fourth-Amendment right to refuse to submit to blood testing. In ***State v. Dalton***, the Court explicitly recognized that the defendant's decision to not consent to an evidentiary blood test was protected by the Fourth Amendment.[53] When Mr. Ayotte withdrew his consent to the blood analysis, he was therefore indisputably exercising his Fourth-Amendment rights, which include the right to revoke or modify his consent.[54]

In circuit court, the State argued Mr. Ayotte made a "second search argument."[55] In other words, according to the State, Mr. Ayotte argued testing his blood was a separate and subsequent search; seizing his blood was the first search.[56] According to the State, Mr. Ayotte argued that without a warrant for the second search, i.e. the testing of his blood, the State could not justify analyzing his blood.[57] The State responded by arguing ***State v. Riedel*** put to rest the proposition that a second warrant was required to justify the testing of a person's lawfully-seized blood.[58] However, Mr. Ayotte did not make a second search argument. His argument in circuit court was that he withdrew

[53] ***State v. Dalton***, 2018 WI 85, ¶ 61.
[54] ***State v. Wantland***, 2014 WI 58, ¶¶ 33–34.
[55] R.25 at 1.
[56] R.25 at 1.
[57] R.25 at 1.
[58] R.25 at 2.

his (previously given) consent to test his blood. For this reason, there is no need for this Court to delve into the second search argument and the caselaw addressing such claims.

Thus, based upon existing state and federal caselaw, questions of consent to search fall within the scope of the Fourth Amendment. This includes the issue of withdrawing consent to a blood draw, as in Mr. Ayotte's case.

D. The analysis of seized evidence in which a person retains a legitimate privacy interest must still be justified under the Fourth Amendment.

In ***Riley v. California***, the United States Supreme Court addressed the applicability of the warrant requirement to cell phone searches.[59] The question in ***Riley*** was whether police could analyze the contents of a lawfully-seized cell phone under the Fourth Amendment.[60] The Court recognized that a huge amount of personal information could be stored on or accessed through a cell phone, including information implicating significant privacy concerns, such as medical records.[61] The Court ultimately decided:

> [A] warrant is generally required before such a search, even when a cell phone is seized incident to arrest … Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.[62]

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[59] ***Riley v. California***, 134 S. Ct. 2473 (2014).
[60] ***Riley***, 134 S. Ct. at 2480.
[61] ***Id***. at 2490.
[62] ***Id.*** at 2493, 2495.

Analyzing a blood sample, like searching a cell phone, potentially presents privacy implications sufficient to require police to obtain a warrant or to proceed only under a warrant exception to search these items. It is irrelevant that ***Riley*** involved a search incident to arrest, and Mr. Ayotte initially consented to the analysis of his blood. The foundational legal principle is identical: Even though a piece of evidence is already in police custody, when there is no legal basis for a search, the search is unlawful. Because the government had no legal justification for the blood analysis after Mr. Ayotte withdrew his consent, it was an unlawful search; and the test results should have been suppressed.

Though the circuit court relied upon ***State v. Riedel*** and, by reference, ***State v. Petrone***, to find Mr. Ayotte had no right to withdraw his consent to blood testing, the circuit court's decision was problematic for two reasons.[63] First, neither ***Riedel*** nor ***Petrone*** apply to Mr. Ayotte's case. ***Riedel*** was issued in 2003. Because it was a decision that predated ***Riley***, it cannot control here. Moreover, in ***Riedel***, the Court of Appeals considered a blood draw justified

[63] R.32 at 6; ***State v. Riedel***, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789; ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991).

through exigent circumstances.[64] Here, the State relied on consent to justify the blood draw.

Petrone involved a question pertaining to the scope of a search warrant—whether the seizure and development of undeveloped film was lawful when the search warrant did not explicitly authorize it.[65] ***Petrone***'s applicability to the facts of this case would be at best tenuous. It is also questionable whether the holding of ***Petrone***—which appears to give police officers a fairly broad latitude in conducting additional searches on previously-seized evidence—would be sustained today in light of ***Riley***.

Other caselaw, such as this Court's decision in ***State v. VanLaarhoven***, do not support the State's theory of a second search analysis. In ***VanLaarhoven***, the police arrested the defendant for OWI, read him the implied consent form, and he consented to an evidentiary test of his blood.[66] The defendant did not withdraw his consent.[67] The state lab tested his blood, and the defendant moved to suppress, arguing that analyzing his blood was a second search, requiring a warrant.[68]

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[64] ***Riedel***, 2003 WI App 18, ¶ 6.
[65] 161 Wis. 2d at 539–40.
[66] ***State v. VanLaarhoven***, 2001 WI App 275, ¶¶ 2, 8, 248 Wis. 2d 881, 637 N.W.2d 411.
[67] ***Id***. ¶ 3.
[68] ***Id***.

The defendant's argument in ***VanLaarhoven*** was unsuccessful. This Court stated that when the defendant agreed to the evidentiary test, he had "consented to a taking of a sample of his blood *and* the chemical analysis of that sample."[69] Given that the defendant never withdrew his consent to testing, the government did not need a warrant to test the sample.[70] In other words, this Court found that the testing was an "essential part of the seizure" to which the defendant consented.[71]

Mr. Ayotte does not ask that this Court reach a contradicting conclusion to its decision in ***VanLaarhoven***. He does not dispute that the State does not need to get a warrant for a search to which a person has voluntarily consented. On the other hand, should the State argue here that ***VanLaarhoven*** does not require the police to obtain a warrant or voluntary consent to order a blood sample to be analyzed, that would have serious constitutional implications.

The point is that the original justification for the seizure *and* analysis of the blood—Mr. Ayotte's consent—ceased to exist when he withdrew that consent. Mr. Ayotte did not and does not argue

[69] ***Id***. ¶ 8 (emphasis added).
[70] ***Id***. ¶ 16.
[71] ***Id***.

testing his seized blood sample is a second search. When he withdrew consent to testing his blood, the search should have promptly ceased.

E. Mr. Ayotte properly withdrew his consent to his blood sample's analysis.

Before any analysis occurred, Mr. Ayotte sent a letter to the laboratory, the arresting law enforcement agency, and the District Attorney's office. The letter explicitly stated that he was "asserting his right to privacy in his blood and requests that no analysis be run without a warrant authorizing so[.]"[72]

This letter was clear and direct. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[73] Any reasonable person reading this letter would understand that Mr. Ayotte had withdrawn his consent to blood analysis and had asserted his right to privacy.

The Wisconsin State Crime Laboratory disregarded Mr. Ayotte's letter and conducted an ethanol analysis of his blood sample.[74] This analysis was an unlawful search. The government's only justification for testing Mr. Ayotte's blood was that it was a

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[72] R.17.
[73] ***Jimeno***, 500 U.S. at 251, (*citing* ***Illinois v. Rodriguez***, 497 U.S. 177, 183–89 (1990); ***Florida v. Royer***, 460 U.S. 491, 501–02 (1983)).
[74] R.71 at 112.

search pursuant to voluntary consent. But Mr. Ayotte, through his letter to the laboratory, clearly and unequivocally withdrew that consent before the analysis took place. Therefore, the government's analysis of his blood sample was an unlawful search in violation of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, and the results of the analysis must have been suppressed.

CONCLUSION

A person has a privacy interest in his or her blood. This privacy interest does not go away simply because the police have already seized the blood. Given that privacy interest, a person has a Fourth Amendment right to withdraw consent to the search at any point in the process. Here, Mr. Ayotte properly withdrew consent to testing by letter to the State Crime Laboratory. At the time the Laboratory received his letter, it should have ceased preparing to test Mr. Ayotte's blood sample. Because it failed to do so, it analyzed Mr. Ayotte's blood without the provided legal basis for testing—his consent. The testing of Mr. Ayotte's blood was thus unjustified by law. Any evidence derived from the testing should have been suppressed. That test result was the strongest evidence at trial against Mr. Ayotte. Had the test result been suppressed, the jury would not have convicted Mr. Ayotte.

Dated at Madison, Wisconsin, August 22, 2018.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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Dated: August 22, 2018.

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BY: _____
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CERTIFICATION

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 s. 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: August 22, 2018.

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