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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

CASE NO. 2019AP1786 - CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ERIC JEAN OVERVIG,

Defendant-Respondent.

ON APPEAL OF A JUDGMENT OF CONVICTION ENTERED IN THE ST. CROIX COUNTY CIRCUIT COURT, THE HON. EDWARD F. VLACK PRESIDING

DEFENDANT-RESPONDENT'S BRIEF

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ISSUE PRESENTED

1. Did the trial court err when it ruled that Wis. Stat. § 346.65(2)(cm) could be applied in this case?

   The clear terms of Wis. Stat. § 346.65(2)(cm) allow an alternative mandatory sentence in counties, such as St. Croix County, which opt "to offer a reduced minimum period of imprisonment for the successful completion of a probation period that includes alcohol and other drug treatment." The State is wrong to argue that it cannot apply in St. Croix County.

2. Did the trial court err when it found the defendant eligible to receive the alternative mandatory minimum listed in Wis. Stat. § 346.65(2)(cm) despite not being sentenced in the drug treatment court because he, the defendant, had already completed inpatient treatment?

   The State argues that the statute cannot apply where "no treatment program is ordered at sentencing" despite Mr. Overvig completing treatment prior to sentencing and being ordered to "continue" treatment while on probation.

Summary of Argument

Nothing in the statutes requires the court to require a person to attend treatment court in order to be eligible for the reduced mandatory minimum listed in Wis. Stat. § 346.65(2)(cm) where he or she has already received treatment and is then placed on probation and ordered to continue in treatment. To read the statutes in that manner is contrary to the statute's language and intent and makes no sense. Furthermore, the State concedes that St. Croix County has a drug and alcohol treatment court. Wisconsin Stat. § 346.65(2)(cm) applies to counties that "offer a reduced minimum period of imprisonment for the successful completion of a probation period that includes drug and other alcohol treatment." Therefore, the

alternative minimum listed in Wis. Stat. § 346.65(2)(cm) is a sentencing option that clearly can apply in St. Croix County.

If this court finds that the statute is not clear, then the legislative intent is to allow courts to grant reduced periods of incarceration to those defendants who are taking active and effective measures to control their alcoholism. That is what Mr. Overvig has done. The legislature intended for reduced minimum sentences to apply to persons willing to submit to a treatment court, and the State concedes that Mr. Overvig has taken "great, great steps" to get his alcoholism under control.

Statement on Oral Argument/Publication

Neither oral argument nor publication are requested.

Statement of Facts

Mr. Overvig was convicted of Operating a Motor Vehicle while Intoxicated—third offense, following a plea. Prior to plea and sentencing, Mr. Overvig's attorney submitted a letter to the court which included the following statement from Mr. Overvig's sobriety coach. It stated:

> This letter is to inform you that our mutual client Eric Overvig has successfully completed six months of the Connection Program effective 01/31/19. Eric continues to appear genuinely motivated to be sober. He has been actively engaged in intensive outpatient at Hazelden Betty Ford in St. Paul and is following the recommendation of the treatment team. He is attending 3-4 twelve step meetings per week, speaks to his sponsor daily, and is working on Step 4. He continues to engage in service work regularly. (18:2)

The State's two alternative recommendations reflected an agreement that Mr. Overvig was entitled to some sentence minimization given the extremely extensive Alcohol or Other Drug Abuse (AODA) treatment that he had completed. The State told the court that it was recommending a sentence that was a downward deviation

from the local guidelines, and this deviation was due to Mr. Overvig's very positive attitude and accomplishments:

> [H]e was very cooperative with law enforcement…He's also completed inpatient treatment, which apparently he enrolled in relatively soon after this incident. He's been involved in intensive outpatient, going to meetings. He's been doing all the right things I think to self-correct. And so that's why the State has agreed to deviate two levels downward in our guidelines with a recommendation of 80 days versus 110 days and a fine and costs of $3,264 and driver's license revocation and ignition interlock for a period of 30 months. (11)

Mr. Overvig's attorney told the court that Mr. Overvig went to inpatient treatment at the Hazelden Betty Ford Foundation, and, "Last month, he got his one-year chip." (38:12) He's been incredibly involved in AA and the recovery community. Not just attending three meets a week but often speaking (to groups as large as 150 people) … sharing his story." (38:13; 18:2) He recently sponsored two AA members, and "he's done everything he can to improve society and give back to the extent he can." (38:13)

Mr. Overvig argued that he was entitled to be sentenced pursuant to Wis. Stat. § 346.65(2)(cm) which he called a "once in the lifetime opportunity." (38:14) The State argued that the statute does not "appl[y] here in St. Croix County." The prosecutor added, "So I don't think it applies here. I, of course, appreciate the argument and I understand that Mr. Overvig has taken great, great steps to get his substance abuse disorder seemingly under control and I appreciate that. But I just don't think that that statute applies in this situation." (38:22) The prosecutor said, "We do have a—we do have a track now for--" and the Court answered, "Treatment court." (38:23)

The court added, "I have to be honest, I have a gentleman in front of me who, within a day, puts himself in inpatient treatment and I don't see very many of those and I've only been doing this for 45 years." (38:23-24) The court then entered the following sentence:

> I think you have taken it upon yourself to take steps to deal with you're an alcoholic. Let's be blunt. That's the way it is. And so I have to fashion a sentence that I think is applicable and will not only impress upon you my concern but also recognize the efforts you've made up to this point. So, listen carefully because there's another way I can put you on probation. I can impose a sentence and stay it and say you're on probation. If you violate and you're revoked, you automatically go to jail. That's now your incentive. A year in the County Jail, stayed.
>
> …
>
> 2 years probation. Now also listen carefully because there's this minimum jail time. Okay. I'm going to recognize the minimum in one respect is 45 days, the other minimum if we have this program is 14 days. So what I'm going to do is 20 days. That gives you credit for the time you've done the outpatient (sic) and 20 days. You have a day credit. You're going to get good time. I'm not going to calculate your release date. But that takes into consideration the efforts you made to deal with your alcoholism, takes into consideration that I've got to look at the protection of the public. But I think in fairness to you, you did 30 days inpatient, so it's not 20 days. That's sufficient.

(38:25-26)

The court added that it was "concerned about you continuing with your treatment, paying for the treatment you need. I appreciate right now it's AA." (38:26) The court sentenced him to 9 months in jail (38:30) with 2-years-probation with 120 days condition time imposed and stayed "So if you violate and don't get revoked, I can put you in jail. I don't think I'm ever going to see you again." (38:26) The court ordered that Mr. Overvig comply with another AODA evaluation should the agent require it and "just comply with any treatment. But right now just continue your treatment." (38:27) Finally, the court entered a 2-year revocation of license and required an ignition interlock device for 30 months. (38:27, 28)

In response to Mr. Overvig's thanks to all involved, the court said, "You made the effort, sir. You just earned that reduction. I think that's warranted." (38:30) The Judgment of Conviction reflects that the court ordered an Alcohol Assessment "Within 30 days and follow through." The court also ordered that Mr.

Overvig "Cooperate with any other evaluation, assessment and/or program as requested" and maintain "Absolute sobriety" and "Follow rules and regulations of agent." (25:1-2)

The State now appeals.

ARGUMENT

I. The court had the statutory authority to order an alternative mandatory minimum sentence pursuant to Wis. Stat. § 346.65(2)(cm)

A. The clear language of the Wis. Stat. § 346.65(2)(cm) applies.

The clear language of Wis. Stat. § 346.65.(2)(cm) authorized the court to enter an alternative minimum sentence under the facts of this case. The statute merely requires that an alternative minimum sentence can apply whenever the court requires that the defendant "completes a period of probation that includes alcohol and other drug treatment." Wis. Stat. § 346.65(2)(c). Furthermore, the State concedes that St. Croix County has a drug treatment court. The State is wrong, therefore, to imply that St. Croix County is not one of the "certain counties" to which the statute applies. (State's brief at 10). On the contrary, the statute applies whenever the County has a drug treatment court.

Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." ***State ex rel Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." ***Id***. at ¶46.

The statute is clear and reads:

> 346.65(2)(cm) In any county that opts to offer a reduced minimum period of imprisonment for the successful completion of a probation period that includes alcohol and other drug treatment, if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307(1) equals 3, except

> that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one, the fine shall be the same as under par. (am) 3., but the period of imprisonment shall be not less than 45 days, except that if the person successfully completes a period of probation that includes alcohol and other drug treatment, the period of imprisonment shall be not less than 14 days. A person may be sentenced under this paragraph or under par. (bm) or (dm) or sub. (2j) (bm), (cm), or (cr) or (3r) once in his or her lifetime.

According to its terms, it applies in St. Croix County, a county that has opted "to offer a reduced minimum period of imprisonment for the successful completion of a probation period that includes alcohol and other drug treatment," and it can apply whenever the court order orders "a period of probation that includes alcohol and other treatment." Those are the facts of this case, and therefore the statute grants the court the authority to enter an alternative minimum sentence in this case.

In addition, the State is wrong to argue that the statute requires successful completion of probation prior to entry of a mandatory minimum sentenced. That is not what the statute says. According to the State, "this alternative sentencing is only available to those who engage in the 'successful completion of a probation period that includes alcohol and other drug treatment.'" (State's brief at 10). However, the statute does not require probation prior to the sentence. It says nothing of the sort. It merely requires that a person "successfully completes a period of probation that includes alcohol and other drug treatment."

In this case, Mr. Overvig has successfully completed alcohol treatment and is very actively involved in current treatment through Alcoholics Anonymous, the most successful and widespread alcohol treatment program in the country.[1] The court has ordered that he "continue [his] treatment" in AA (25:1) and has ordered that he complete an AODA assessment and cooperate with any program as requested. (25:2) As the Wisconsin Supreme Court noted in ***State v. Williams***, 2014 WI 64, ¶36, 355 Wis. 2d 581, 852 N.W.2d 467, the structure of the OWI penalty

[1] Current membership in A.A. is estimated to be more than 2.1 million active members worldwide. https://www.aa.org/assets/en_US/smf-132_en.pdf

statute "would allow for treatment in either a probation treatment program as contemplated by Wis. Stat. § 346.65(2)(bm)-(dm) or a program like the Alcohol or Other Drug Abuse (AODA) programs for offenders sentenced to prison." The statute does not specifically require use of a drug court, and both the inpatient treatment that Mr. Overvig successfully completed and AA program that the court ordered that he continue in are mainstream, well-established, and historically proven drug treatment programs like DOC AODA programs. Finally, the court placed Mr. Overvig on probation and made sure to retain the ability to sanction Mr. Overvig severely, should he recidivate.

In this case, the words convey clearly that Wis. Stat. § 346.65(2)(cm) can be used in St. Croix County to enter a reduced mandatory minimum sentence, provided the defendant successfully "completes" a period of probation that includes successful alcohol treatment. Notably, the legislature used the present tense "completes" rather than the past tense "completed" or past perfect tense "has completed." Present tense "is the verb form you use when you talk about what's happening right now."[2] Because the legislature used the present tense of the verb, it did not require that Mr. Overvig had already completed probation. It merely required both successful alcohol treatment, which had occurred, and a period of probation, including drug or alcohol treatment, which the court ordered. The use of Wis. Stat. § 346.65(2)(cm) was therefore permissible in this case.

The court's order is fully authorized by the clear terms of Wis. Stat. § 346.65(2)(cm), and therefore this court must affirm.

B. The legislature intended for the alternative mandatory minimum to be applicable broadly.

Even if this court does not find that the words of the statute are clear, as it should, it must find that the legislature intended to allow the alternative to the

[2] https://www.vocabulary.com/dictionary/present%20tense

otherwise mandatory minimum sentence to apply broadly when a defendant is succeeding on probation and in alcohol treatment. The Wisconsin Supreme Court has said that courts generally are not to consult extrinsic sources of statutory interpretation "unless the language of the statute is ambiguous. By 'extrinsic sources' we mean interpretive resources outside the statutory text—typically items of legislative history." ***Kalal***, 271 Wis. 2d 633 at ¶50.

There are two reasons that the legislature intended for the exception carved out in Wis. Stat. § 346.65(2)(cm) to apply broadly. First, it is the law that courts are to enter "the minimum amount of custody or confinement which is consistent with protections of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***State v. Gallion***, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197, *quoting* ***State v. McCleary***, 49 Wis. 2nd 263, 276, 182 N.W.2d 512 (1971). The legislature is presumed to know the law when it enacts legislation. ***Turner v. Taylor***, 2003 WI App 256, ¶21, 268 Wis. 2d 628, 673 N.W.2d 716. Given this law, the statute must be read with awareness that the legislature intended for the minimum possible sentence to apply wherever possible.

Second, 2009 Wisconsin Act 100 does not stand for the principle that the legislature intended to limit the exception to the normal mandatory minimum as claimed by the State. On the contrary, it explicitly expanded the exception to any County, like St. Croix County, that "offers a reduced minimum period of imprisonment for the successful completion of probation period that includes alcohol and other drug treatment…." Wis. Stat. § 346.65(2)(cm). Specifically, Section 46 of 2009 Wisconsin Act 109 extended the applicability of the statute greatly and provided:

> **SECTION 46.** 346.65 (2) (cm) of the statutes is amended to read:
>
> 346.65 **(2)** (cm) In ~~Winnebago County~~ any county that opts to offer a reduced minimum period of imprisonment for the successful completion of a probation period that includes alcohol and other drug treatment, if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of

> suspensions, revocations, and other convictions counted under s. 343.307(1) ~~within a 10-year period,~~ equals 3, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one, the fine shall be the same as under par. (am) 3., but the period of imprisonment shall be not less than ~~30~~ 45 days, except that if the person successfully completes a period of probation that includes alcohol and other drug treatment, the period of imprisonment shall be not less than ~~10~~ 14 days. A person may be sentenced under this paragraph or under par. (bm) or (dm) or sub. (2j) (bm) ~~or~~, (cm), or (cr) or (3r) once in his or her lifetime.

Therefore, the intent of the legislature was to extend the applicability of the statute specifically and to enable courts to enter lesser sentences whenever the defendant completes a probation period that includes alcohol and other drug treatment.

C. The Rule of Lenity requires affirmance.

If resort to the legislative history does not clarify the intent of the legislature, then the rule of lenity applies. That rule "generally establishes that ambiguous penal statutes should be interpreted in favor of the defendant." ***State v. Jackson***, 2004 WI 29, ¶41, 270 Wis. 2d 113, 676 N.W.2d 872. Therefore, "When there is doubt concerning the severity of a penalty described by statute, Wisconsin law provides that a court must favor a milder penalty over a harsher penalty. ***Id.***

As stated in ***State v. Wilson***, 77 Wis. 2d 15, 28, 252 N.W.2d 64, 70 (1977), this rule is based on sound legal policy:

> The canon of strict construction is grounded on policy. Since it is within the power of the lawmakers, the burden lies with them to relieve the situation of all doubts. And "since the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty where the legislature had not clearly and unequivocally prescribed it."

Id., p. 8 (citations omitted). See also ***State v. Cole***, 262 Wis.2d 167, ¶ 67, 663 N.W.2d 700.

In this case, the legislature has not specified that the term of probation must be completed prior to entry of the alternative minimum sentence. Nor does it say that the rules of probation listed in Wis. Stat. § 973.09 apply. Because the statute does not say these things, the ambiguity must be construed against the State.

Furthermore, this court has held that inpatient treatment can establish custodial status. In ***State v. Sevelin***, 204 Wis. 2d 127, 554 N.W.2d 521 (Ct. App. 1996), for example, this court held that a man furloughed to a substance abuse treatment center was "in constructive custody of the Polk County sheriff while in the treatment center." ***Id.*** at 129. Similarly, in this case, this court should affirm the trial court's order and should find that Mr. Overvig's inpatient treatment while on bond prior to entry of probation satisfied the terms of the statute.

The legislature intended for the court to have broad authority to enter an alternative minimum sentence where the court orders probation and has ordered appropriate drug and alcohol treatment, and any ambiguity must be construed against the State.

II. The trial court had the discretion to determine what drug treatment to require when it placed Mr. Overvig on probation.

The State's complaints that the trial court had no authority to apply Wis. Stat. § 346.65(2)(cm) without ordering drug treatment through a drug treatment court fail for multiple reasons. The State first complains that, "The court did not order that Overvig successfully complete anything," (State's brief at 11), but that argument is not correct. The Judgment of Conviction requires an AODA assessment, compliance with any evaluation and follow up programs as requested, complete sobriety, and compliance with any rules provided by his probation agent. (25:1-2) In addition, the court ordered Mr. Overvig to "continue [his] treatment" and continue participation in AA (38:27; 25:2) and the State never explains why more than that is required when Overvig had already successfully completed inpatient

treatment. It is for the court and not the State to determine if AA is a sufficient treatment program following successful inpatient treatment, and the State has absolutely no support for its claim that "'AA' is not a 'probation treatment program.'" (State's brief at 11) The State has not explained how a court cannot order treatment to continue in AA. On the contrary the court has discretion to order the appropriate treatment, and the court has the discretion to order Mr. Overvig to continue participation in an alcohol program in which he is thriving and succeeding.

The State argues that the prior completion of inpatient treatment disqualifies Mr. Overvig from qualifying for the alternative mandatory sentence carved out in Wis. Stat. § 346.65(2)(cm) because Mr. Overvig had the bad form to be too avid, too punctual, and too successful in completing drug treatment so that he did not need to be ordered to complete another inpatient drug or alcohol treatment. This is clearly not what the law says nor what the legislature intended. In short, the State wrongly arrogates to itself the functions and authority of the circuit court, and it fails to explain why the legislature allows it and not the court to determine which drug treatment to order.

Wisconsin courts have "inherent, implied and incidental powers" that include those necessary "to fairly administer justice." ***State v. Dowdy***, 2010 WI App 158, ¶22, 330 Wis. 2d 444, 792 N.W.2d 230. This does not mean that courts are free to disregard mandatory minimum sentences established by the legislature. Instead, courts must exercise their authority "within defined parameters." ***Id.*** This court's standard of review to the circuit court's findings of fact is "highly deferential." A trial court's "[f]indings of fact shall not be set aside unless clearly erroneous." ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530, *quoting* Wis. Stat. § 805.17(2)(2003-04). In this case, this court should affirm the trial court's findings that Wis. Stat. § 346.65(2)(cm) can apply in St. Croix County, that inpatient treatment in the Hazelden Betty Ford Treatment program and continued participation in A.A. during a period of probation that requires total

abstinence satisfies the statute, and that judgment of conviction that the trial court entered was a proper use of the court's discretion and authority.

This court should affirm the trial court's entry of the sentence consistent with Wis. Stat. § 346.65(2)(cm) for several reasons. First, it is a fair sentence, and the sentence most consistent with "protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *See, **Gallion**, **supra.***

Second, the trial court was best situated to determine whether use of Wis. Stat. § 346.65(2)(cm) is appropriate in St. Croix County and to determine what treatment was appropriate to order in this case. Both the court and the State agree that St. Croix County is a county with a drug and alcohol treatment court. They differ, however, on whether the court, and not the State, has the authority to determine what treatment is appropriate to order following successful inpatient treatment. The State has not cited any authority for its belief that the court has limited discretion to fashion the most appropriate sentence. That is not the law.

Third, the State's complaints elevate form over function. After admitting that St. Croix County has a drug treatment court and that Mr. Overvig has done a "great, great" job in completing alcohol treatment, it is left arguing that the court erred in ordering an alternative mandatory minimum sentence because Mr. Overvig completed alcohol inpatient treatment without being ordered to do so and the court's order to continue treatment in a program that is working well is somehow insufficient. That is a perverse reading of the statutes that is contrary to the intent of the legislature. The legislature intended to deter further drunk driving by increasing the penalties while also providing incentives for successful completion of drug and alcohol treatment. Mr. Overvig successfully completed inpatient alcohol treatment prior to being placed on probation, and the court has ordered continued participation in treatment. The statute authorizes the judgment entered, and, therefore, this court should affirm.

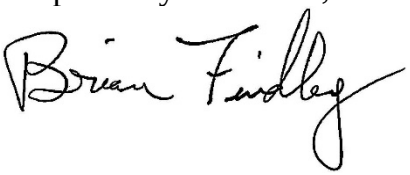
Conclusion

The trial court has concluded that Mr. Overvig has earned the right to be sentenced to the lesser mandatory minimum sentence because he has done a notably outstanding job of successfully completing alcohol treatment and achieving and maintaining sobriety. Given these facts, the court has determined in its discretion that continuing treatment in AA while on probation is appropriate. The State says 'not good enough' apparently because it believes that the statute requires that an inpatient treatment program must be ordered pursuant to a drug court. A regular circuit court is unacceptable as is an order to continue participation in AA following inpatient treatment. This argument is simply wrong and wrong-headed. The statute does not say that it applies only when entered pursuant to treatment court, and Mr. Overvig's successful treatment is what the statute intends to achieve. For these reasons, this court should affirm the court's thoughtful, appropriate, and correct application of Wis. Stat. § 346.65(2)(cm) in this case.

Wherefore, Eric Jean Overvig, the defendant-respondent, respectfully requests that this court affirm the judgment of conviction entered by the trial court.

Dated this 29th day of January, 2020.

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 4241 words.

Dated this 29th day of January, 2020.

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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 29th day of January, 2020.

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DEFENDANT-RESPONDENT'S APPENDIX

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INDEX TO APPENDIX

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (13)

I hereby certify that: I have submitted an electronic copy of this appendix, which complies with the requirements of § 809.19 (13). I further certify that: This electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

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CERTIFICATION AS TO APPENDIX

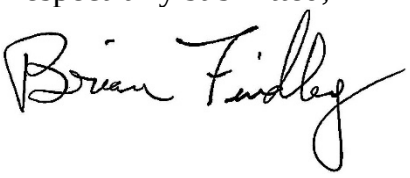
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited 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 first names and last initials 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.

Dated this 29th day of January, 2020.

Respectfully submitted,



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