

FILED
02-15-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
I N S U P R E M E C O U R T

Case Nos. 2019AP001832-CR & 2019AP001833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. YAKICH,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX

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ISSUE PRESENTED

When a defendant has been found not guilty by reason of mental disease or defect in two separate cases and is subject to two separate commitment orders, does the circuit court have the authority to run the terms of commitment consecutive to one another?

The circuit court concluded that it had the authority to run two commitment orders consecutive to one another.

The court of appeals reframed the issue, stating that the question was whether the circuit court had the authority to order “a total commitment period that is longer than the maximum term of confinement in prison that could have been imposed for any one of the crimes to which [Mr.] Yakich pleaded NGI.” *State v. Yakich*, No. 2019AP1832-CR, slip op. ¶13 (Wis. Ct. App. Jan. 14, 2021) (unpublished). (App. 107). The court of appeals concluded that it did have such authority.

CRITERIA FOR REVIEW

This case presents a novel question of statutory interpretation:¹ whether the circuit court can run

¹ Because Mr. Yakich challenges the court of appeals’ construction of a statute, he has served copies of this brief on the attorney general, the speaker of the assembly, the

two separate NGI² commitment orders consecutive to one another. *See* Wis. Stat. Rule § 809.62(1r)(c)2. The only case which arguably comes close to answering this question is *State v. C.A.J.*, 148 Wis. 2d 137, 434 N.W.2d 800 (Ct. App. 1988). As will be discussed below, *C.A.J.* is no longer good law.

Additionally, this case provides the court with an opportunity to clarify the law regarding multiple commitment orders. *See* Wis. Stat. Rule § 809.62(1r)(c). The court of appeals' holding in this case creates a legal fiction that courts order a single commitment period even when committing defendants in separate cases involving separate commitment orders. This holding is unworkable.

Finally, this case presents a purely legal question as well as an issue that is likely to recur. *See* Wis. Stat. Rule § 809.62(1r)(c)3. NGI commitments occur with some regularity in Wisconsin. The standard form used by circuit courts to commit individuals found NGI specifically asks whether the term of commitment will run consecutive or concurrent to other NGI commitments. *See* CR-271, 08/12, Order of Commitment (Not Guilty by Reason of Mental Disease or Defect). Given that circuit courts are presented with the choice of

president of the senate, and the senate majority leader pursuant to Wis. Stat. § 893.825. *See* attached cover letter.

² "NGI" is an acronym that refers to instances where criminal defendants are found not guilty by reason of mental disease or defect and subsequently committed under Wis. Stat. § 971.17.

consecutive commitments each time they commit a defendant, it is likely that courts will continue to run NGI commitments consecutive to one another unless this Court intervenes.

STATEMENT OF FACTS

On May 20, 2018, the Waupaca County Sheriff's Department responded to a complaint about a telephone threat. (1:1).³ Mr. Yakich's mother reported that while she was on the phone with Mr. Yakich, he made threats to harm his brother. (1:2). Mr. Yakich was arrested and charged in Case No. 18-CF-169 with phone harassment, in violation of Wis. Stat. § 947.012(1)(a), and felony bail jumping, in violation of Wis. Stat. § 946.49(1)(b).⁴ (1:1). He was subsequently released on a signature bond. (2:1).

On August 20, 2018, the Waupaca Police Department responded to Mr. Yakich's residence in order to perform a welfare check. (2019AP001833, 3:3). A crisis worker at the Waupaca County Department of Health and Human Services had called 9-1-1 stating that she had concerns that Mr. Yakich was suicidal. (2019AP001833, 3:3). When officers knocked, Mr. Yakich did not answer the door.

³ This is a consolidated appeal of two separate cases. Unless otherwise noted, all citations to the record refer to the record in 2019AP001832.

⁴ At the time, Mr. Yakich was on bond in another case, giving rise to the bail jumping charge.

(2019AP001833, 3:3). As officers attempted to break into the front door of the apartment, Mr. Yakich exited the back door and surrendered to officers. (2019AP001833, 3:4). Officers then searched Mr. Yakich's apartment, where they found marijuana and drug paraphernalia. (2019AP001833, 3:5). Mr. Yakich was arrested and charged in Case No. 18-CF-301 with two counts of felony bail jumping, in violation of Wis. Stat. § 946.49(1)(b); one count of misdemeanor bail jumping, in violation of Wis. Stat. § 946.49(1)(a); unlawful use of a telephone/threatening harm, in violation of Wis. Stat. § 947.012(1)(a); resisting or obstructing an officer, in violation of Wis. Stat. § 846.41(1); possession of THC, in violation of Wis. Stat. § 961.41(3g)(e); disorderly conduct, in violation of Wis. Stat. § 947.012(1); and possession of drug paraphernalia, in violation of Wis. Stat. § 961.573(1). (2019AP001833, 3:1-2).

Mr. Yakich ultimately entered a plea agreement resolving both cases, as well as two other cases that pre-dated these. With regard to these two cases, Mr. Yakich entered a bifurcated plea. He pled guilty to one count of felony bail jumping and one count of phone harassment in 18-CF-169 and two counts of felony bail jumping in 18-CF-301. (34:10). He also pled not guilty by reason of mental disease or defect as to those counts.⁵ (34:10). The

⁵ As part of the global plea agreement, Mr. Yakich also pled no contest to one count of disorderly conduct in Waupaca County Case No. 15-CM-10 and one count of assault by a prisoner in Waupaca County Case No. 17-CF-140.

state did not contest that Mr. Yakich was not guilty by reason of mental disease or defect. (34:9). The court accepted Mr. Yakich's guilty and not guilty by reason of mental disease or defect pleas in both cases. (34:22).

The parties disagreed on the appropriate length of the commitment periods. The state requested a total of five years' commitment, a two-year term of commitment in 18-CF-169 and a three-year term of commitment in 18-CF-301, to run consecutive to one another. (34:12-14, 23). Mr. Yakich objected, arguing that separate commitment orders could not be run consecutive to one another. (34:24-27). The court disagreed and ordered a two-year term of commitment in 18-CF-169 and a three-year term of commitment in 18-CF-301, to run consecutive to one another and to any other term of commitment. (34:27-28).

After a predisposition investigation report was conducted, the court ordered institutional placement. (35:8). After six months, Mr. Yakich petitioned for conditional release. (21:1). On September 3, 2019, the court found that Mr. Yakich was appropriate for conditional release. (22:1).

ARGUMENT

This Court should accept review and hold that NGI commitments cannot be run consecutive to one another.

This case asks the novel question of whether circuit courts have the authority to run two separate commitment orders, entered in different cases based on separate conduct, consecutive to one another. The trial court's authority to commit an individual found not guilty by reason of mental disease or defect derives from the statute. *State ex rel. Helmer v. Cullen*, 149 Wis. 2d 161, 164, 440 N.W.2d 790 (Ct. App. 1989). As such, the question is one of statutory interpretation, which this court reviews de novo. *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 2001 WI 86, ¶13, 245 Wis. 2d 1, 628 N.W.2d 893.

A. There is no statutory authority permitting circuit courts to run separate commitment orders consecutive to one another.

When a criminal defendant is found not guilty by reason of mental disease or defect, the circuit court is required to commit the individual to the department of health and human services. Wis. Stat. § 971.17. This is a statutorily-created two-step process. First, the circuit court enters an order for commitment, in which the court enters a formal finding of not guilty by reason of mental disease or defect and determines the maximum time period for

which the individual may be subject to the commitment order. Wis. Stat. § 971.17(1).

Second, the court determines the appropriate placement for the individual during his term of commitment. Wis. Stat. § 971.17(3). The court may order institutional care or conditional release. *Id.* If an individual is placed in institutional care, he has the opportunity to petition for conditional release every six months. Wis. Stat. § 971.17(4)(a). If an individual is placed on conditional release, he has the opportunity to petition for early termination of the commitment order every six months. Wis. Stat. § 971.17(5).

This appeal involves the court's statutory authority in the first step of this process, determining the appropriate term of commitment. In interpreting a statute, this court first looks to its plain language. *Landis*, 245 Wis. 2d 1, ¶14. If the language of the statute "clearly and unambiguously sets forth the legislative intent," this court should not look beyond the language. *Id.* In examining the language of a statute, this court does not look at the language in isolation but rather interprets its meaning in the context of related statutes. *Id.* ¶16.

The circuit court's authority to commit individuals who have been found not guilty by reason of mental disease or defect stems from Wis. Stat. § 971.17, which requires the circuit court to enter a commitment order "as soon as practicable after the judgment of not guilty by reason of mental disease or

defect is entered.” Wis. Stat. § 971.17(2)(a). The statute specifically instructs courts on how to determine the maximum term of commitment for a single commitment order. *See* Wis. Stat. § 971.17(1)(a)-(d). However, the statute is silent on whether courts can run two separate commitment orders consecutively. In fact, nowhere in the statutes has the legislature authorized the circuit court to run separate commitment orders consecutive to one another or consecutive to any other form of supervision, like a criminal sentence or term of probation. Without such statutory authorization, the court may not do so. *See, e.g., Grobarchik v. State*, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981) (“If the authority to fashion a particular . . . disposition exists, it must be derived from the statutes.”).

It is clear that the legislature knows how to authorize circuit courts to impose consecutive terms of supervision when it wants to. For example, circuit courts are authorized to run criminal sentences consecutive to one another. *See* Wis. Stat. § 973.15(2). (“[T]he court may . . . provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously.”). The legislature has also explicitly authorized courts to run a term of probation consecutive to a criminal sentence. Wis. Stat. § 973.09(1)(a). (“The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.”). No parallel statute exists in the context of NGI commitments, indicating the

legislature's intent that NGI commitments not run consecutively.

The court of appeals has used similar reasoning in concluding that NGI commitments may not be run consecutive to other forms of supervision. In *State v. Harr*, this court considered whether NGI commitments and prison sentences may be run consecutively. 211 Wis. 2d 584, 587, 568 N.W.2d 307 (Ct. App. 1997). The court concluded that Wis. Stat. § 973.15, which authorizes consecutive criminal sentences, does not apply to NGI commitments because a commitment is not a “sentence” within the meaning of the statute. *Id.* Because neither Wis. Stat. § 973.15 nor § 971.17 authorize the running of NGI commitments consecutive to criminal sentences, the court concluded that court lack the authority to do so. *Id.*

Wisconsin courts have also examined whether other analogous forms of supervision may be run consecutive to one another, and their conclusions support the interpretation that the statutes do not authorize courts to run NGI commitments consecutively. For example, probation is similar to an NGI commitment in that both impose supervision and other conditions on an individual but are not “sentences.” *State v. Gereaux*, 114 Wis. 2d 110, 113, 338 N.W.2d 118 (Ct. App. 1983). Chapter 973, which governs sentencing and probation procedures, lacks any explicit authority for courts to impose a term of probation consecutive to another term of probation. *State v. Schwebke*, 2001 WI App 99, ¶¶27-29, 242

Wis. 2d 585, 627 N.W.2d 213 *affirmed on other grounds*, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666. Lacking such statutory authority, circuit courts may not run probation terms consecutive to one another. *Id.*

Another analogous example is that of juvenile dispositions, which also are not considered “sentences.” *State v. Woods*, 173 Wis. 2d 129, 137-38, 496 N.W.2d 144 (Ct. App. 1992). Because they are not considered sentences, Wis. Stat. § 973.15 does not authorize courts to impose juvenile dispositions consecutive to one another. *See id.* And Chapter 938, which governs the juvenile justice system, provides no similar authority for courts to run juvenile dispositions consecutive to one another. *Id.* Thus, juvenile dispositions may not be run consecutively. *Id.*; *see also In re Commitment of Wolfe*, 2001 WI App 136, ¶15, 246 Wis. 2d 233, 631 N.W.2d 240. (“[T]he concept of consecutive sentences is foreign in the context of juvenile adjudications and dispositions.”).

NGI commitments are analogous to probation and juvenile dispositions in that while they involve government-imposed restraint on liberty, they are not “sentences” and therefore not governed by Wis. Stat. § 973.15. There is no other statutory authority for running them consecutively. As in the case of probation and juvenile dispositions, the lack of statutory authority prohibits courts from running them consecutive to one another.

B. The statutory background and the drafting history of the NGI commitment statutes support the conclusion that commitments cannot be run consecutive to one another.

The legislative history of Wis. Stat. § 971.17 confirms that the circuit court lacked the authority to run Mr. Yakich's NGI commitments consecutive to one another. Over the past few decades, Wis. Stat. § 971.17 has undergone several substantive changes. In 1989, the Judicial Council's Insanity Defense Committee redrafted the NGI statutes. The committee sought to clarify commitment procedures and codify existing case law. 1989 Wis. Act 334, Prefatory Note. (App. 126).⁶

The committee specifically intended to authorize consecutive NGI commitments, and the committee notes confirm this. At the committee's November 10, 1989 meeting, the committee specifically discussed "concerns about the question of concurrent versus consecutive commitments." Judicial Council Insanity Defense Committee Summary of Proceedings, Nov. 10, 1989, at 1. (App. 131).⁷ Several committee members expressed their desire to allow courts to impose consecutive

⁶ Available at: <https://docs.legis.wisconsin.gov/1989/related/acts/334>.

⁷ The committee's meeting notes can be found in their entirety in the LRB's drafting file for Act 334, on file at the Wisconsin Law Library. The relevant committee note is included in the appendix to this brief. *See* (App. 131-138).

NGI commitments. *Id.* (App. 131). To clarify that commitments could be run consecutively, the committee decided to reference § 973.15(2), the statute which authorizes courts to impose consecutive criminal sentences. *Id.* at 1-2. (App. 131-132).

Thus, after the passage of Act 334, § 971.17(1) read as follows: “When a defendant is found not guilty by reason of mental disease or defect, the court shall commit the person . . . for a specific period not exceeding two-thirds of the maximum term of imprisonment *that could be imposed under s. 973.15(2)* against an offender convicted of the same crimes.” (emphasis added). This reference made clear that courts had the authority to run NGI commitments consecutive to one another.

In 2001, several substantive changes to Wisconsin’s criminal code were passed as part of Act 109. The purpose of these changes was to make various portions of the criminal code consistent with the truth-in-sentencing (TIS) legislation that had been passed in 1998. *See* 1997 Wis. Act 283.⁸ These changes included an amendment to the maximum permissible length of an NGI commitment under

⁸ Available at: <https://docs.legis.wisconsin.gov/1997/related/acts/283.pdf>. For a summary of the history of truth in sentencing in Wisconsin, see Michael B. Brennan, Thomas J. Hammer & Donald V. Latorraca, “Fully Implementing Truth-in-Sentencing,” 75 Wis. Lawyer 10 (Nov. 2002), available at <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=75&Issue=11&ArticleID=259>.

§ 971.17. 2001 Wis. Act 109 §§ 1106-1108. (App. 140-141).⁹ Most relevant here, the amendment removed the reference to § 973.15(2). *Id.* (App. 140-141).

The drafting history of Act 109 indicates an initial intent to maintain the court's authority to run NGI commitments consecutive to one another, even under TIS. Early drafts still included the reference to Wis. Stat. § 973.15(2). 1999 Assembly Bill 465 §§ 733-735. (App. 143-145).¹⁰ In later drafts however, references to Wis. Stat. § 973.15(2) were removed. *See* 2001 Assembly Bill 3 §§ 780-782. (App. 147-148).¹¹

The legislative history is silent as to the exact reason the reference to § 973.15(2) was removed. When the legislative history contains no clear statement as to why a certain amendment was made, the statutory background (“previously enacted and repealed statutory provisions”) is the most telling indication of the meaning of a statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶52 n.9, 271 Wis. 2d 633, 681 N.W.2d 110; *see also County of Dane v. Labor and Industry Review Commission*, 2009 WI 9, ¶27, 315 Wis. 2d 293, 759 N.W.2d 571. The reference to § 973.15(2) was

⁹ Available at: <https://docs.legis.wisconsin.gov/2001/related/acts/109.pdf>.

¹⁰ Available at: <https://docs.legis.wisconsin.gov/1999/related/proposals/ab465.pdf>.

¹¹ Available at: <https://docs.legis.wisconsin.gov/2001/related/proposals/ab3.pdf>.

originally added to the NGI commitment statute in 1989 to authorize courts to run NGI commitments consecutively. The legislature is presumed to have known this. *In re Commitment of West*, 2011 WI 83, ¶61, 329 Wis. 2d 710, 790 N.W.2d 543 (“The legislature is presumed to know the law, and to know the legal effect of its actions.”). Its deliberate removal in Act 109 makes clear that the legislature intended to remove the courts’ authority to run NGI commitments consecutively. Further, the legislature thought the reference necessary to authorize consecutive commitments; the language could not, therefore, have been superfluous.

In summary, the legislature explicitly referenced § 973.15(2) in order to give courts the authority to run NGI commitments consecutive to one another. Later, as part of TIS legislation, the legislature removed the reference to § 973.15(2), thereby removing courts’ authority to do so. And without clear statutory language, courts lack the authority to impose consecutive NGI commitments. *See Cullen*, 149 Wis. 2d at 164. Thus, the statute is clear, and the legislative history supports, that NGI commitments may not be run consecutive to one another.

C. The court of appeals erred in reframing the issue and in concluding that the five-year commitment period was permissible.

Despite the clear lack of statutory authority, the court of appeals affirmed the circuit court. However, the court of appeals reframed the issue, concluding that “in cases involving multiple offenses, a court exercising its statutory authority does not actually impose multiple commitment periods designated as either ‘concurrent’ or ‘consecutive.’” *Yakich*, No. 2019AP1832-CR, slip op. ¶2. (App. 102). Instead, it held that the circuit court ordered “a total commitment period” of five years and that it “had statutory authority to order a total commitment period that is longer than the maximum term of confinement in prison that could be imposed for any of the crimes to which Mr. Yakich pleaded NGI.” *Id.* ¶¶13, 40. (App. 107-108, 121).

This holding is contrary to how the circuit court actually structured Mr. Yakich’s commitment orders. The court did not impose one five-year commitment period. The court imposed two separate commitment periods, in two separate cases, and ran them consecutive to one another. The court specifically stated, “On 18-CF-169, I will order that Mr. Yakich be committed to the department of health services for a period of two years And I will order on 18-CF-301, that he be committed to the department of health and human services for a period of three years. . . . I will order that this commitment be

consecutive.” (34:27-28). The court issued a separate commitment order in each case, one imposing a two-year commitment period, and one imposing a three-year commitment period. (2019AP001832, 8:2; 2019AP001833, 8:2). (App. 123, 125). Both orders stated that the commitment is “to run consecutive to any other § 971.17, Wis. Stats. commitments.” (2019AP001832, 8:2; 2019AP001833, 8:2). (App. 123, 125).

This is consistent with how circuit courts around the state handle multiple NGI commitments. Courts routinely issue separate commitment orders in each case and either run them consecutive or concurrent to one another. The standard form order adopted by the Wisconsin Judicial Conference, which provides check boxes for concurrent or consecutive commitments, reflects this common practice. *See* CR-271, 08/12, Order of Commitment (Not Guilty by Reason of Mental Disease or Defect).

Further, the court of appeals’ decision is not supported by law. The court cites no statutory authority to support its decision, and it even admits that “[t]he commitment statute does not provide explicit instructions on how to proceed when a defendant has been found NGI of more than one crime.” *Yakich*, No. 2019AP1832-CR, slip op. ¶11. (App. 106). Instead, the court relies on language in *State v. C.A.J.*, 148 Wis. 2d 137. *C.A.J.* considered whether, under the 1988 version of § 971.17, the “maximum period of commitment is equivalent to maximum consecutive terms or maximum concurrent

terms.” 148 Wis. 2d at 138. The court of appeals seems to have grasped onto this language and attempted to apply it to the current NGI commitment statute. However, the NGI commitment statute has changed significantly since *C.A.J.* was decided, and it is not applicable to the current statute.

Under the 1987-88 version of § 971.17 which *C.A.J.* interpreted, courts had the authority to commit defendants but not to specify the length of commitment. *See* Wis. Stat. § 971.17(1) (1987-88). (“When a defendant is found not guilty by reason of mental disease or defect, the court shall order him to be committed to the department to be placed in an appropriate institution for custody, care, and treatment until discharged as provided in this section.”). Rather, the term of the commitment was defined by statute as “the maximum period for which a defendant could have been imprisoned if convicted of the offense charged.” Wis. Stat. § 971.17(4) (1987-88). The court had no discretion to issue a shorter commitment period. *See Cullen*, 149 Wis. 2d at 164.

The question *C.A.J.* answered was “whether the maximum term of commitment [as defined by statute] is equivalent to maximum consecutive terms or maximum concurrent terms.” 148 Wis. 2d at 138. *C.A.J.*’s focus was on the definition of the term “maximum term of commitment.” It concluded that the maximum term of commitment “must be based on consecutive terms.” *Id.*

Under the current statute, the maximum period of commitment is no longer statutorily set as the maximum period for which a defendant could have been imprisoned if convicted of the offense charged. Now, the circuit court must order a specific commitment period, and it has the discretion to order up to the statutory maximum. *See* Wis. Stat. § 971.71(1). When the legislature gave courts the authority to impose a commitment period less than the maximum period of time a defendant could be imprisoned for the underlying charges, it also specifically gave the court the authority to run those commitments consecutive or concurrent to one another by referencing Wis. Stat. § 973.15(2). Judicial Council Insanity Defense Committee Summary of Proceedings, Nov. 10, 1989, at 1-2. (App. 131-132). In other words, the maximum commitment period was no longer required to be based on consecutive calculations. Instead, this too was left to the court's discretion.

These changes rendered *C.A.J.* inapplicable to the current NGI commitment statute. The court of appeals is right when it says that *C.A.J.* did not hold that a circuit court can order consecutive commitments. *See Yakich*, No. 2019AP1832-CR, slip op. ¶23. (App. 112). At that point in time, the courts did not even have the authority to specify the term of commitment, let alone whether or not it would run consecutive to other commitments. Now, however, the court *does* have the authority to specify the term of commitment. Thus, the question is no longer whether the statute requires the maximum period to be

calculated consecutively; the question is whether the statute grants the circuit court authority to order commitments consecutive to one another. *C.A.J.* did not answer this question, and by adopting language from *C.A.J.*, the court of appeals failed to answer it as well.

The court of appeals' erroneous reliance on *C.A.J.* threatens to cause confusion in the lower courts about how to handle multiple NGI commitments. In attempting to adopt *C.A.J.*'s language regarding the maximum period of commitment, the court of appeals adopts a confusing concept of a single commitment period that somehow encompasses multiple commitment orders. In doing so, it states that the circuit court's use of the terms "consecutive" and "concurrent" when dealing with multiple commitment orders as a legal "fiction." *Yakich*, No. 2019AP1832-CR, slip op. ¶24 n.12. (App. 113). This court should accept review to clarify the proper procedure for handling multiple NGI commitments.

Further, the court of appeals' conclusion that the five-year commitment period was permissible is not supported by statute. As discussed, the statutory language which authorized courts to run NGI commitments consecutive to one another was intentionally removed from the statute, removing courts' authority to do so. This court should further accept review to hold that circuit courts do not have the authority to run NGI commitments consecutive to one another.

CONCLUSION

For the reasons stated above, Mr. Yakich respectfully requests that this court grant review and reverse the court of appeals' decision.

Dated and filed this 15th day of February, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 4,225 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated and filed this 15th day of February, 2021.

Signed:

CARY BLOODWORTH
Assistant State Public Defender

APPENDIX

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