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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appeal No. 2021AP000484
Washington County Circuit Court Case Nos. 2020TR000836

In the Matter of the Refusal of Edward R. Gasse:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD R. GASSE,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT MR. GASSE REFUSED
CHEMICAL TESTING IN WASHINGTON COUNTY,
THE HONORABLE , JUDGE, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT EDWARD R. GASSE**

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES.....	iii
STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION.....	iii
STATEMENT OF THE CASE/FACTS.....	1
STANDARD OF REVIEW.....	10
ARGUMENT.....	10
BASED ON THE FACTS ADDUCED AT THE REFUSAL HEARING, THE COURT ERRED IN FINDING OFFICER HAD THE REQUISITE LEVEL OF SUSPICION TO BELIEVE MR. GASSE WAS DRIVING OR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL	
CONCLUSION.....	17
FORM AND LENGTH CERTIFICATION.....	18
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	19
APPENDIX CERTIFICATION.....	20
APPENDIX.....	21
Decision and Order.....	App.1
Excerpts from Refusal Hearing 09/23/2020.....	App.6

TABLE OF AUTHORITIES

Page No.

CASES

Wisconsin Supreme Court

<i>In re Smith</i> , 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243.	10,15
<i>State v. Blatterman</i> , 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26.	10
<i>State v. Sykes</i> , 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277.	14
<i>State v. Fry</i> , 131 Wis.2d 153, 388 N.W.2d 565 (1986).	14
<i>State v. Lange</i> , 2009 WI 49, 317 Wis.2d 383, 766 N.W.2d 551.	15
<i>State v. Nordness</i> , 128 Wis.2d 15, 381 N.W.2d 300 (1986).	14
<i>County of Jefferson v. Renz</i> , 231 Wis.2d 293, 603 N.W.2d 541 (1999).	13

Wisconsin Court of Appeals

<i>County of Dane v. Sharpee</i> , 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).	15
<i>State v. Kasian</i> , 207 Wis.2d 611, 621-22, 558 N.W.2d 687 (Ct.App. 1996).	13-15
<i>State v. Wille</i> , 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994).	13-15
<i>Village of Elkhart Lake v. Borzyskowski</i> , 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985).	15

Wisconsin Constitution

Article I, Section 11.	14
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United States Constitution

Fourth Amendment.	14
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STATEMENT OF THE ISSUES

Did the officer have the requisite level of suspicion, pursuant to, to believe that Mr. Gasse was driving or operating a motor vehicle while he was under the influence of an intoxicant, as required under Wis.Stat. §343.305(9)(a)5a?

The trial court answered both questions yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Edward R. Gasse (Mr. Gasse) was charged in the Washington County, with having operated a motor vehicle while under the influence of an intoxicant (OWI) contrary to Wis. Stat. §346.63(1)(a), with having operated a motor vehicle with a prohibited alcohol concentration (PAC) contrary to Wis. Stat §346.63(1)(b), both as third offenses and with refusing to submit to a chemical test in violation of Wis. Stat. §343.305(9) on February 29, 2020. The defendant timely filed a request for a refusal hearing on March 5, 2020.

A refusal hearing was held on September 23, 2020¹, the Honorable James G. Poulos, Judge, Washington County Circuit Court presiding. On said date, the court found Mr. Gasse unlawfully refused chemical testing. A Dispositional Order/judgment was filed on March 9, 2021 was entered on April 1, 2021. (R. 16:1-5/ A.App. 1-5).

On March 17, 2021, the defendant timely filed a Notice of Appeal.

Pertinent facts in support of this appeal were adduced at the refusal hearing held on September 23, 2020 and were

¹ Mr. Gasse also moved to suppress the blood test result on grounds that the blood was drawn without a warrant, however, the defense did not seek leave to appeal that

introduced through the testimony of Germantown police officer Cody Farnsworth. Officer Farnsworth testified he had been with the Germantown police department for two and one-half years, and successfully completed the 720 hour law enforcement training academy. (R.29:8/ A.App.6).

Officer Farnsworth testified he was working in his capacity as a police officer on February 29, 2020. Farnsworth was at the police department at approximately 12:19 a.m.. On that date, at that time, he was advised Mr. Gasse was in the police department lobby in reference to an incident that had occurred on February 28th at approximately 11:00 p.m. (R.29:10/ A.App.7). Other officers apparently had contact with Mr. Gasse about an hour and one-half earlier, and thought he was intoxicated by alcohol. (R.29:11/A.App.8). The incident occurred at Mr. Gasse's residence which is about a mile from the police department. (R.29:10/ A.App.7).

Upon contact with Mr. Gasse, Officer Farnsworth observed an odor of intoxicant from Mr. Gasse's breath, and observed Mr. Gasse to have droopy, glassy, bloodshot eyes, and

ruling and the matter is still pending in circuit court. Both the refusal hearing and suppression motion were held on September 23, 2020

slowed and slurred speech. (R.29:12/A.App.9). However, he was “standing without any kind of problem...” *Id.*

Mr. Gasse was at the police department because he had follow up questions concerning the incident that occurred the previous evening. (R.29:12/ A.App.10). In regard to the incident that had occurred at Mr. Gasse’s residence, officers told him if there were any other issues to contact the police department via telephone. (R.29:12-13/A.App.10-11). According to Officer Farnsworth, Mr. Gasse initially told officers he drove to the police department, but later said a neighbor drove him. (R.29:13, 15/ A.App.12). Mr. Gasse further admitted to consuming one to two beers around 5:00 or 6:00 p.m. (R.29:14/ A.App.11). Officer Farnsworth reviewed surveillance footage and there was no indication that anyone other than Mr. Gasse operated the truck. (R.29:15/ A.App. 12).

Officer Farnsworth asked Mr. Gasse to perform field sobriety tests. Farnsworth testified he has been “trained and certified to administer standardized field sobriety tests.”(R.29:16/ A.App. 13).

Prior to beginning the field sobriety tests, Officer Farnsworth asked Mr. Gasse if he had any medical problem that would prevent him from performing the tests. Mr. Gasse

indicated he had a leg injury from a snowmobile accident which would prevent him from performing the walking and standing exercises. (R.29:17/ A.App.14).

The first field sobriety test Farnsworth administered to Mr. Gasse was the horizontal gaze nystagmus test (HGN). Mr. Gasse complied with the officer's instructions on the HGN test. Officer Farnsworth testified he observed "lack of smooth pursuit, nystagmus prior to 45 degrees, and nystagmus on the onset of maximum deviation." (R.29:18/ A.App.15). Officer Farnsworth specifically did not testify to the significance of each observation, or as to what his observations meant in terms of impairment. Farnsworth then performed the vertical nystagmus portion of the test and could not observe nystagmus because Mr. Gasse kept moving his head. *Id.* During this HGN test, Officer Farnsworth indicated Mr. Gasse's eyes to appear droopy and glassy and bloodshot. *Id.*

Officer Farnsworth also indicated he attempted to complete the vertical nystagmus portion but could not get an accurate reading as Mr. Gasse moved his head. *Id.* Officer Farnsworth did not perform the walk and turn and one leg stand test. The reason given was because of Mr. Gasse's physical limitations. (R.29:19/A.App.16). However, Farnsworth also

failed to perform any non-standard, field sobriety tests. Without further elaborating, Officer Farnsworth testified he was trained in performing non-standardized exercises. (R.29:19/A.App.16). Farnsworth provided no explanation as to why he did not perform the non-standard tests.

Officer Farnsworth requested Mr. Gasse submit to a preliminary breath test. Mr. Gasse refused the request.

Subsequently, Officer Farnsworth arrested Mr. Gasse for operating a motor vehicle while impaired.

Officer Farnsworth then read Mr. Gasse the informing the accused form at 12:48 a.m. (R.29:21/A.App.17) and asked Mr. Gasse if he would submit to a chemical test of his breath. (R.29:22/ A.App.18). Mr. Gasse responded that he would not submit to anything. *Id.* Officer Farnsworth started to complete the warrant paperwork, which took about ten minutes. (R.29:24/ A.App.19). The on- call judge was twenty to twenty-five minutes away. *Id.* Officer Farnsworth described the procedure for driving to the judge and obtaining the warrant. (R.29:24-26/ A.App.19-21). Officer Farnsworth testified he completed the affidavit but did not finish completing the warrant since another officer advised Farnsworth Mr. Gasse had a change of heart and now was willing to provide a breath sample.

Four minutes after reading the first Informing the Accused form, Officer Farnsworth again read the Informing the Accused for to Mr. Gasse at 12:52 a.m. (R.29:27/ A.App.22). Mr. Gasse agreed to take the breath test. (R.29:28/ A.App.23).

Officer Farnsworth waits 20 minutes, Mr. Gasse blows into the Intoximeter machine, but Mr. Gasse cannot provide an adequate sample. (R.29:29/ A.App.24). Because of this, Officer Farnsworth requested Mr. Gasse to provide a sample of his blood. (R.29:29/ A.App.24).

Officer Farnsworth proceeded to read the Informing the Accused form a third time at 1:27 a.m. Mr. Gasse refuses to provide a sample of his blood. (R.29:31/ A.App.25). Once again Farnsworth begins the warrant process.

While Officer Farnsworth is in his car about to leave to obtain the warrant, another officer advised him that Mr. Gasse now is willing to provide a blood sample. Officer Farnsworth marked the informing the accused form as yes at 1:48 a.m. (R.29:31/ A.App.25). Mr. Gasse was transported to the hospital in Menomonee Falls for the blood draw. As Officer Farnsworth pulled into the driveway of the hospital Mr. Gasse asked what would happen if he refused to provide the test. (R.29:33/ A.App.26). Farnsworth told Mr. Gasse “we would figure that

out at a later time.” *Id.* Once inside the hospital, Mr. Gasse continued to state he was refusing. Farnsworth continued to ask Mr. Gasse if he was willing to submit to the test, Mr. Gasse continued to say no. *Id.*

It was 2:23 a.m. and Officer Farnsworth was the only officer with Mr. Gasse, and he would need another officer at the hospital so that he could leave Mr. Gasse with the officer and travel to West Bend to get the warrant signed. (R.29:34/A.App.27). The second officer arrived, Mr. Gasse was “somewhat disorderly” in the lobby (R.29:35/A.App.28) so they took him into an emergency room. Officer Farnsworth continued to ask Mr. Gasse if he was willing to take the test. (R.29:35/A.App.28). Mr. Gasse said he did not want to be poked or prodded with any kind of needle. The officers forcibly drew Mr. Gasse’s blood without a warrant at 2:32 a.m. (R.29:36/A.App.29). Officer Farnsworth testified the reason for the forced blood draw was because he “knew we were working under a time constraint in regards to the .08 restriction.” Officer Farnsworth testified because he was “unable to complete the entirety of the standardized field sobriety exercises, so I was unable to get a full scope of his actual impairment.” (R.29:36/A.App.29).

On cross examination, Farnsworth testified he first had contact with Mr. Gasse at the police department at 12:19 a.m. (R.29:38/ A.App.31). Further, twenty-two minutes later, at 12:41 a.m., Mr. Gasse was arrested. Farnsworth acknowledged at that time he already knew Mr. Gasse refused to provide a preliminary breath sample. At 12:48 a.m., Mr. Gasse advised Farnsworth he would not consent to any test. (R.29:37/ A.App.30)

Officer Farnsworth felt Mr. Gasse could cure the refusal by agreeing to the test, and since he changed his mind prior to the officer leaving to obtain the warrant, Officer Farnsworth halted the process of obtaining the warrant, read another Informing the Accused form, and completed the twenty-minute observation period. *Id.* But Mr. Gasse could not provide a sufficient sample into the machine.

Farnsworth then changed the requested test to blood rather than breath. Mr. Gasse refused, stating “I’m not getting stuck with a needle” “I don’t want to get AIDS”. (R.29:40/ A.App.32). Mr. Gasse commented on the pandemic and indicated he refused to provide a blood sample.

This refusal occurred at 1:27 a.m., an hour and eight minutes after Officer Farnsworth’s initial contact with Mr.

Gasse. (R.29:41/ A.App.33). Now at 1:48 a.m., according to Officer Farnsworth, Mr. Gasse again changed his mind and agreed to the blood test. (R.29:41/ A.App.33). At 1:53 a.m., Officer Farnsworth began to transport Mr. Gasse to the hospital for a blood draw.

At 2:03 a.m. they arrive at the hospital for the blood draw. (R.29:41/A.App.33) Then at 2:04 a.m., Mr. Gasse informed Officer Farnsworth he is not impaired, and he is not getting stabbed with a needle. (R.29:42/ A.App.34). This is about one hour and forty-five minutes after the initial contact. However, Farnsworth still does not attempt to get a warrant, but rather forced Mr. Gasse to provide a blood sample under the auspices of exigent circumstances (the rapid dissipation of alcohol in the blood). Officer Farnsworth conceded no exigent circumstances existed at 12:48 a.m. when Mr. Gasse initially refused testing. Further, he agreed no exigent circumstances existed when Mr. Gasse refused testing at 1:27 a.m. or at 2:04 a.m.. Officer Farnsworth testified he still would have had time to obtain the warrant even an hour and forty-five minutes after the initial contact. (R.29:44/ A.App.35).

Officer Farnsworth testified due to him not being able to “complete the full array of standardized field sobriety exercises,

I had a very small sample of his level of impairment.” (R.29:48/A.App. 36).

The court by written order signed on March 9, 2021 found Mr. Gasse refused to permit chemical testing.

Mr. Gasse timely filed a notice of appeal on March 17, 2021.

STANDARD OF REVIEW

When reviewing the circuit court’s finding of a refusal, appellate court will uphold the lower courts finding of facts unless they are clearly erroneous, but independently reviews application of those facts to constitutional principles, as questions of law. See *State v. Blatterman*, 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26, *In re Smith*, 2008 WI 23, ¶16, bri308 Wis.2d 65, 746 N.W.2d 243.

ARGUMENT

BASED ON THE FACTS ADDUCED AT THE REFUSAL HEARING, THE COURT ERRED IN FINDING OFFICER HAD THE REQUISITE LEVEL OF SUSPICION TO BELIEVE MR. GASSE WAS DRIVING OR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

Pursuant to Wis. Stat. §343.305(9)(a)5, a court considers three issues at a refusal hearing. First, “whether the officer had probable cause to believe the person was driving or operating a

motor vehicle while under the influence of alcohol...and whether the person was lawfully placed under arrest for a violation of s. 346.63(1).” Second, whether the officer provided the implied consent warning as required under Wis. Stat. §343.305(4). Third, “whether the person refused to permit the test.”

The issue herein is whether the officer had the requisite level of probable cause to believe Mr. Gasse was operating while impaired. Based on the facts adduced at the motion hearing, and specifically Officer Farnsworth’s statement that he forced a blood draw because of time constraints, and because without completion of the standard field sobriety tests he was unable to get a full scope of Mr. Gasse’s actual impairment, (R.29:36/ A.App.29) Officer Farnsworth did not have the requisite level of suspicion to believe Mr. Gasse operated his motor vehicle while impaired.

Further, even though Mr. Gasse had some limitations causing Officer Farnsworth to forgo physical field sobriety test, Farnsworth could have performed other non-standardized test. However, Officer Farnsworth chose not to do so.

The observation made by Officer Farnsworth would not have led a reasonable police officer to believe that Mr. Gasse was operating his motor vehicle while impaired.

First, Farnsworth did not testify that he observed Mr. Gasse driving, or that Mr. Gasse drove in a deviant manner. In fact, while Officer Farnsworth testified to the time when he first had contact with Mr. Gasse, a specific time of driving was not established.

Second, the observations made of Mr. Gasse's person and on the limited field sobriety test performed would not have provided probable cause to arrest. After having contact with Mr. Gasse, Officer Farnsworth indicated he thought Mr. Gasse's exhibited slurred speech. Farnsworth also testified he observed Mr. Gasse to have blood shot, droopy and glassy eyes.

Because of the above, Officer Farnsworth requested Mr. Gasse to submit to the Horizontal Gaze Nystagmus test (HGN). Without explanation Officer Farnsworth testified he observed "lack of smooth pursuit, nystagmus prior to 45 degrees, and nystagmus on the onset of maximum deviation." (R.29:18/A.App.15). Officer Farnsworth did not testify as to whether he observe the above in one eye or both. He did not testify as to what he was trained to look for, or the significance of the

observations relative to impairment. Nor did the State attempt to establish a foundation for the observations. Farnsworth did not perform the physical field sobriety tests because Mr. Gasse had non-impairment related physical ailments which prevent the testing. More importantly, Officer Farnsworth did not perform non-standard field sobriety tests.

The defense acknowledges that field sobriety tests are not necessary to establish probable cause to arrest. see *State v. Kasian*, 207 Wis.2d 611, 558 N.W.2d 687 (1996) and *State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994). While field sobriety tests are not necessary in every impaired driving situation, they will be required in some cases. The *Kasian* court held that “in some cases field sobriety tests may be necessary to establish probable cause; in other cases, they may not. This case, we conclude, falls into the latter category.” *Id.* at 622. In both *Kasian* and *Wille* the court upheld the arrests in the absence of field sobriety tests. Based on the facts of each case, the court found that field sobriety tests were unnecessary to establish probable cause to arrest.

However, each case is easily distinguishable from the case herein. Unlike Mr. Gasse’s case, both *Kasian* and *Wille* involved accidents that left the defendants injured and unable to

perform field sobriety tests. In *Kasian*, the defendant was found injured lying next to his van. *Kasian* at 622. In *Wille* the defendant suffered facial lacerations that required medical attention. Because of these injuries officers were unable to perform field sobriety tests. Furthermore, at the hospital, Wille made admissions suggesting consciousness of guilt, and those admissions added to the facts justifying Wille's arrest. (Wille stated to officers that he had to "quit doing this."). *Wille* at 329. Mr. Gasse made no such admissions.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, protect individuals against unreasonable seizures. "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment..." *State v. Sykes*, 2005 WI 48, ¶14, 279 Wis.2d 742, 695 N.W.2d 277 citing to *State v. Fry*, 131 Wis.2d 153, 169, 388 N.W.2d 565 (1986). In the context of a refusal hearing, probable cause "exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ...that the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986) see also *In re*

Smith, 2008 WI 23, ¶15, 308 Wis.2d 65, 746 N.W.2d 243. Probable cause requires that at the moment of arrest, an officer knew of facts and circumstances that were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W. 2d 506 (Ct. App 1985). A reasonable police officer need only believe that guilt is more than a possibility. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The State has the burden to show the evidence known to the arresting officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of operating a motor vehicle while impaired. *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551, see also *In re Smith*, 2008 WI 23 at ¶15. Probable cause is determined on a case-by-case basis using the totality of the circumstances. *State v. Kasian*, 207 Wis.2d 611, 621-22, 558 N.W.2d 687 (Ct.App. 1996)

This is not a case where the officer observed the defendant operating the motor vehicle or observed deviant driving. see *State v. Lange*, 2009 WI 49, ¶38, 317 Wis.2d383, 766 N.W.2d 551 (Wildly dangerous driving alone might suggest the absence of a sober driver) see also *In re Smith*, 2008 WI 23,

308 Wis.2d 65, 746 N.W.2d 243, (At the time of the arrest, the Deputy knew that the defendant had been driving well in excess of the speed limit late at night on a two-lane highway, and observed the defendant cross the centerline twice).

Furthermore, the observations of Mr. Gasse and the single field sobriety test performed (the HGN) do not rise to the level of suspicion to even request a preliminary breath test under Wis. Stat. §343.303. “Probable cause to believe” refers to a quantum of evidence greater than reasonable suspicion to make an investigative stop, but less than probable cause to make an arrest. *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999).

Officer Farnsworth testified on cross-examination he forced Mr. Gasse to take the test without a warrant because he could not gauge Mr. Gasse’s level of impairment. By his own admission, he could not gauge Mr. Gasse’s level of impairment.

Based on the above, the state has failed to meet its burden. Officer Farnsworth did not have “probable cause to believe [Mr. Gasse] was driving or operating a motor vehicle while under the influence of alcohol...” see Wis. Stat. §343.305(9)(a), and thus the court erred in finding Mr. Gasse refused chemical testing.

CONCLUSION

Because the State failed to establish that Officer Farnsworth had probable cause to believe that Mr. Gasse was operating while impaired under Wis. Stat. §343.305(9)(a)5.a., the trial court erred in finding Mr. Gasse unlawfully refused to permit chemical testing. The Court should reverse the judgment of conviction and vacate the refusal.

Dated this 26th day of July, 2021.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 26 pages. The word count is 4785.

Dated this 26th day of July, 2021.

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the electronic copy of the brief filed with the court and served electronically on all opposing parties.

Dated this 26th day of July, 2021.

Respectfully submitted,

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APPENDIX 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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 26th day of July, 2021.

Respectfully submitted,

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APPENDIX