STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

CASE NO. 2022AP000647 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY J. LAROSE,

Defendant-Appellant.

On appeal from a judgment of conviction
and order denying postconviction relief,
both entered in the Oneida County Circuit Court,
the Honorable Patrick F. O'Melia, presiding.

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

In 2009, Judge Patrick O'Melia sentenced Anthony LaRose in a misdemeanor case. He imposed six months' jail, commenting that prison time seemed inevitable should Mr. LaRose face sentencing on a felony. Judge O'Melia also opined that the State should have charged Mr. LaRose as a repeater, implying that he considered prison time appropriate then and there.

Years later, Judge O'Melia sentenced Mr. LaRose again, this time for a felony. Before sentencing, he independently investigated Mr. LaRose's juvenile and adult records. Then, the morning of sentencing, he presided over a divorce involving a woman who'd had a child with Mr. LaRose while both were married to others. Judge O'Melia repeatedly remarked on the divorce at Mr. LaRose's sentencing, speculating that it was in part Mr. LaRose's fault and that the couple might be his victims. Judge O'Melia also voiced his wholly negative view of Mr. LaRose, criticizing not just his criminal conduct, but also his personality and lifestyle.

> On this record, would a reasonable person have questioned whether Judge O'Melia was acting as a neutral and detached magistrate when he imposed sentence on Mr. LaRose?

The circuit court answered "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. LaRose does not request oral argument or publication.

STATEMENT OF THE CASE AND FACTS

This motion revolves around Mr. LaRose's sentencing hearing—what Judge O'Melia said, did, and relied upon in making his sentencing decision. The broader factual and procedural picture is largely irrelevant. Thus, what follows is an overview of the case centered on Judge O'Melia's sentencing remarks.

The State charged Mr. LaRose with one count of first-degree sexual assault of a child. (1:1). The complaint alleged that Mr. LaRose's nine-year-old stepdaughter accused him of sexually assaulting her, and that Mr. LaRose promptly confessed. (1:1-2). It also said that police obtained incriminating evidence while searching Mr. LaRose's home. (1:2).

Mr. LaRose pleaded guilty to an amended charge, and the parties agreed to jointly recommend 14 to 17 years of initial confinement followed by 20 years of extended supervision. (16:1, 3).

At sentencing, after the parties' arguments and Mr. LaRose's allocution, Judge O'Melia listed the considerations relevant to his decision. Then he discussed them in depth.

He began with Mr. LaRose's "past criminal record." (49:27; App. 18). He noted that, while "counsel probably can't," he was "able to go back to [Mr. LaRose's] juvenile records." (49:27; App. 18). He then described an incident in which Mr. LaRose allegedly "hit … or pushed [a] teacher," causing police to respond. (49:27; App. 18). Judge O'Melia commented that, due to this incident, Mr. LaRose's record "started very young,

younger than [he'd] actually ever seen." (49:27; App. 18). "Usually it'll start off as a CHIPS case or something like that," Judge O'Melia explained, "but here [Mr. LaRose was] involved in delinquent behavior." (49:27; App. 18).

Judge O'Melia then moved on to Mr. LaRose's adult record. After summarizing Mr. LaRose's criminal convictions, he opined: "as I read the complaints going back, it's a lot of the same behavior, just a different age." (49:27-28; App. 18-19).

As for Mr. LaRose's varied employment history, Judge O'Melia remarked that "it's not very prosocial these different types of employment." (49:30; App. 21). He then admonished Mr. LaRose: "You're not able to really keep a stable lifestyle for the family … to the point where you ultimately began taking care of the children in lieu of working and [you] allow[ed] your wife to work and be the breadwinner." (49:30; App. 21).

Next Judge O'Melia discussed the "undesirable" conduct he believed Mr. LaRose had engaged in, whether prosecuted for it or not. (49:31; App. 22). First he noted that, while "it's not against the law to sit at home all day and eat potato chips and play video games, … that's an undesirable behavior pattern. And in this case we've kind [of] got that, but it's kind of aggravated with smoking dope and having kids in the house." (49:31; App. 22). He also disapproved of Mr. LaRose's sexual behavior, saying: "[Y]ou … have … some very strong sexual addictions to the point where you've been unfaithful to your wife on more than one occasion, [and] fathered a child with another married woman." (49:32-33; App. 23-24).

In fact, Judge O'Melia noted, he had seen that "married women" in court that very morning when, coincidentally, he presided over her divorce. (49:33; App. 24). "And I had to ask her about" her son, he continued, "because I wanted to make sure that the dad in that case knew that somebody else had fathered the child. Well, anyway, he did." (49:33; App. 24). Judge O'Melia concluded by opining that the divorce may not have been "a direct result of what happened" between the woman and Mr. LaRose, but their child in common could not have helped: "Having that, always waking up to that every day, being reminded that your wife was unfaithful …." (49:33; App. 24).

Eventually Judge O'Melia turned to Mr. LaRose's personality, deeming him manipulative and narcissistic (though he conceded he wasn't sure Mr. LaRose met the definition of narcissistic). (49:33-34; App. 24-25). He also discussed the victim in this case, and the collateral damage Mr. LaRose's offense likely caused beyond the victim. (49:36-43; App. 27-34). Returning to the divorce he'd presided over, Judge O'Melia asked: "[G]eez, are they a victim of what happened or what you do, you know? Because of your undesirable behavior patterns is that [other woman] a victim?" (49:41; App. 32). Finally, he summarized his views on Mr. LaRose by describing him as "a 34-year-old narcissist with … a ninth grade education with … sporadic employment [and a] long criminal history, [who] smokes dope almost every day while he's in charge of the children," and who has "an insatiable appetite for sex of any kind, with anyone, even the daughter." (49:43; App. 34).

The circuit court imposed 25 years of initial confinement followed by 20 years of extended supervision. (40:1). Thus, Mr. LaRose received about a decade more incarceration than the parties had jointly requested. (*See* 16:3).

Postconviction, Mr. LaRose pointed out that this was not the first time he'd been sentenced by Judge O'Melia. (73:4). In 2009, Judge O'Melia presided over his sentencing after revocation in Oneida County Case No. 09-CM-613. (73:18-23; App. 45-50). During that hearing, Judge O'Melia told Mr. LaRose his conduct had reached "a point where [judges] almost don't care what you do." (73:21; App. 48). He continued: "We'll just keep putting you in jail and put you ultimately in prison because that's where you're headed. They should have cited you with a repeater…. [And] if this continues and there's a felony, boy … I'm not sure how another court could really keep you from prison. And you're not too far from a felony." (73:21-22; App. 48-49).

On this record, Mr. LaRose moved for resentencing before a different judge, citing the appearance of judicial bias. (73:7-8). If that relief was denied, Mr. LaRose also sought simple resentencing, arguing that Judge O'Melia erroneously exercised his discretion by relying on an improper factor (Mr. LaRose's gender). (73:15-16).

Judge O'Melia heard Mr. LaRose's postconviction motion and rejected both claims. (*See* 85). He held that there was no appearance of bias found that he had not relied on Mr. LaRose's gender. (86:5-7, 13-14; App. 5-7, 13-14). Mr. LaRose appeals only the first ruling.

ARGUMENT

The totality of the circumstances surrounding Mr. LaRose's sentencing would give a reasonable person doubts about Judge O'Melia's neutrality. The record thus establishes the appearance of judicial bias.

A. Overview of argument.

Judge O'Melia's statements at Mr. LaRose's 2009 sentencing after revocation revealed that he prejudged the need for prison time here. Judge O'Melia's sua sponte inquiry into Mr. LaRose's juvenile and criminal records showed that he did not approach this sentencing impartially. And Judge O'Melia's sweeping expressions of antipathy toward Mr. LaRose underscored what his prejudgment and independent factual investigation had already demonstrated: he was not acting as a neutral and detached magistrate when he sentenced Mr. LaRose to 45 years of imprisonment.

The totality of the circumstances surrounding Mr. LaRose's sentencing would lead a reasonable person to question whether Judge O'Melia was able to "hold the balance nice, clear, and true." *See State v. Gudgeon*, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114. The appearance of judicial bias at Mr. LaRose's sentencing violated due process, and he asks this Court to grant him resentencing before a different judge. *See State v. Goodson*, 2009 WI App 107, ¶¶8, 18, 320 Wis. 2d 166, 771 N.W.2d 385.

B. Basic legal principles and standard of review.

Every defendant has a due process right to an impartial sentencing court. *Id.*, ¶8. While a court is presumed to act impartially, a defendant can overcome that presumption by showing bias by a preponderance of the evidence. *Gudgeon*, 295 Wis. 2d 189, ¶20. If a defendant meets that burden—which an appellate court determines independently, as a matter of law—"the error is structural and not subject to a harmless error analysis." *Id.*; *see also Goodson*, 320 Wis. 2d 166, ¶7. In other words, a defendant sentenced by a biased judge is automatically entitled to be resentenced by someone else. *See Goodson*, 320 Wis. 2d 166, ¶18.

There are two basic categories of judicial bias that can necessitate resentencing: objective and subjective. *Id.*, ¶8. This case involves objective bias. There are also two types of objective bias: actual bias and the appearance thereof. *Id.*, ¶¶9, 14. The appearance of bias is the constitutional defect at issue. It exists whenever a sentencing court makes statements that would lead a reasonable person, "taking into consideration human psychological tendencies and weaknesses," to conclude the judge "cannot be trusted" to remain neutral. *Gudgeon*, 295 Wis. 2d 189, ¶24.

One recurring appearance-of-bias issue arises when a judge's on-the-record comments show they prejudged the defendant's sentence, at least in part, before hearing the parties' arguments or the defendant's allocution. *See generally, State v. Marcotte*, 2020 WI App

28, ¶¶20-27, 392 Wis. 2d 183, 943 N.W.2d 911. Another longstanding and interrelated pair of bias problems occurs when a judge's on-the-record comments reveal an opinion formed from facts outside the record, and the opinion betrays "such a high degree of … antagonism" toward the defendant that "fair judgment [becomes] impossible." *See Liteky v. United States*, 510 U.S. 540, 555 (1994). While precedent does not set forth the universe of scenarios in which a reasonable person would question a judge's neutrality, Judge O'Melia's sentencing comments gave rise to both of these well-known bias problems.

C. Judge O'Melia's statements at Mr. LaRose's 2009 sentencing after revocation suggest he prejudged the need for prison time.

At Mr. LaRose's 2009 sentencing after revocation, Judge O'Melia told Mr. LaRose: "We'll just keep putting you in jail and put you in prison because that's where you're headed." (73:21; App. 48).He then commented that the State should have charged Mr. LaRose as a repeater, suggesting he wanted to put Mr. LaRose in prison that very day. And he concluded by noting that he didn't see how a judge sentencing Mr. LaRose for a felony could do anything but imprison him. These on-the-record remarks showed that Judge O'Melia had predetermined the necessity of prison should Mr. LaRose eventually face sentencing for a felony.

The case law governing prejudgment clarifies the due process problem here. *Gudgeon* is a helpful starting point. There, a probation agent wrote the circuit court advising against extending the defendant's probation and recommending that the defendant's unpaid

restitution be converted into a civil judgment. *Gudgeon*, 295 Wis. 2d 189, ¶3. The circuit court wrote a note at the bottom of the agent's letter: "No—I want his probation extended." *Id.* It then sent a copy of the annotated letter to the probation agent, the State, and defense counsel. *Id.* Later, it followed through and extended the defendant's probation. *Id.*, ¶4. The court of appeals ordered resentencing before a different judge, holding: "Although we may be convinced that the circuit court was not prejudging the extension [of probation] issue, that is not the test. The risk of bias that the ordinary reasonable person would discern—which is the test—is simply too great to comport with constitutional due process." *Id.*, ¶30.

Later cases have reaffirmed the *Gudgeon* approach. In *Goodson*, the defendant was convicted of five crimes with an array of dispositions: a prison sentence, jail time, and consecutive probation. 320 Wis. 2d 166, ¶2. The sentencing judge told the defendant that, should he get revoked from probation or extended supervision, he would "be given the maximum, period." *Id.* But when the defendant was in fact revoked from extended supervision, the judge ordered time served. *Id.*, ¶4. It was only at the defendant's second reconfinement hearing that the judge made good on his promise, imposing the maximum and telling the defendant, "'that's the agreement you and I had back at the time you were sentenced.'" *Id.*, ¶5. The court of appeals held that "[t]here could not be a more explicit statement confirming that the sentence was predecided." *Id.*, ¶16.

State v. Lamb, an unpublished decision citable for its persuasive value,[1] provides yet another example of prejudgment. 2018 WI App 66, 384 Wis. 2d 414, 921 N.W.2d 522 (unpublished op.).[2] There the circuit court became aware, just prior to sentencing, that the parties intended to jointly recommend probation. *Id.*, ¶5. But it made comments, during a discussion with the defendant, indicating that it was unlikely to follow that recommendation. *Id.*, ¶5. In particular, after the defendant said it was possible he'd go home that day, the circuit court said, "there's a possibility, but it's probably not going to happen." *Id.* The court of appeals held this response impermissible. *Id.*, ¶14. It noted that the comment preceded the parties' arguments and the defendant's allocution—information critical to the circuit court's sentencing decision. *Id.*, ¶15. And it rejected the State's contention that the circuit court "spoke only of probabilities and possibilities." *Id.*, ¶17. Taken together, the court of appeals held, the circuit court's comments "reasonably conveyed … that, before [it] had heard any sentencing arguments, it had effectively decided against ordering probation." *Id.* There was no need for the circuit court to use more definitive language to violate due process.

Finally, *Marcotte* offers the most recent appearance-of-bias guidance. The defendant in *Marcotte* was placed on probation with participation in drug court as a condition. 392 Wis. 2d 183, ¶3. Both before and at sentencing, the circuit court told the defendant he'd go

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[1] *See* Wis. Stat. § 809.23(3)(b).

[2] A copy of this unpublished opinion is included in the appendix as required by Wis. Stat. § 809.23(3)(c); (App. 53-57).

to prison if he did not succeed in drug court. *Id.*, ¶¶4-5. After he relapsed and had his probation revoked, the defendant was sentenced after revocation, and the circuit court imposed ten years' imprisonment. *Id.*, ¶¶8-10. On appeal, the defendant argued that the circuit court's comments about prison, along with its dual role presiding over the drug court and sentencing proceedings, created the appearance of bias. *Id.*, ¶¶14, 18. The court of appeals agreed. It held that the circuit court's comments showed it had already rejected alternative dispositions (like time served, a fine, or a jail sentence) before it reached the sentencing after revocation hearing. *Id.*, ¶26. Its premature decision to impose some amount of prison violated due process and necessitated resentencing by a different judge. *Id.*, ¶41.

Here, Judge O'Melia stated on the record at Mr. LaRose's 2009 sentencing after revocation that he didn't see how a future judge could decline to imprison Mr. LaRose should he eventually face sentencing for a felony. In making this comment, Judge O'Melia revealed what the disposition would likely be if he personally sentenced Mr. LaRose for a felony. As in *Lamb*, where the circuit court said probation was "probably not going to happen," Judge O'Melia did not express certainty—but did reveal that he'd prejudged Mr. LaRose's sentence. *See* 384 Wis. 2d 414, ¶5; (App. 54).

Judge O'Melia also commented, at Mr. LaRose's 2009 sentencing after revocation, that he "should have" been charged as a repeater (presumably because that would have made a prison sentence possible). This statement resembles the *Gudgeon* court's statement

that it "want[ed]" the defendant's probation extended. 295 Wis. 2d 189, ¶26. "Neutral and disinterested tribunals do not 'want' any particular outcome." *Id*. Thus, they do not opine about what charging decisions they would have preferred.

Both by revealing his desire to impose prison and opining that a prison sentence was almost guaranteed at any future felony sentencing, Judge O'Melia exhibited objective bias. "[A] reasonable person familiar with human nature knows that average individuals sitting as judges would probably follow their inclination to rule consistently rather than against their personal desires." *Id*. Thus, Judge O'Melia "reasonably conveyed … that, before [he] had heard any sentencing arguments, [he] had effectively decided against" imposing probation, jail time, or a fine. *Lamb*, 384 Wis. 2d 414, ¶17; (App. 56). Such prejudgment offends due process. *See Marcotte*, 392 Wis. 2d 183, ¶¶26, 41.

D. Judge O'Melia's independent inquiry into Mr. LaRose's record suggests a departure from his role as a neutral and detached magistrate.

While no party submitted them for consideration or referenced them at any point, Judge O'Melia sought out, and reviewed, Mr. LaRose's juvenile records and past criminal complaints. Judge O'Melia thus conducted an independent factual investigation instead of relying solely on the more limited facts of record. In doing so, he violated the longstanding tenet that "[a] judge must not independently investigate facts in a case and must

consider only the evidence presented." SCR 60:04(g) (comment). He also failed to give the parties the chance to respond to the facts outside the record on which he relied. In both ways, he violated Mr. LaRose's due process rights.

The Wisconsin Supreme Court discussed an analogous situation in a judicial disciplinary proceeding that resulted in a judge's five-day suspension. *See Judicial Commission v. Piontek*, 2019 WI 51, 386 Wis. 2d 703, 927 N.W.2d 552. Before sentencing, the judge "conducted an independent internet investigation" that revealed "what he believed to be incriminating information" about the defendant. *Id*., ¶16. That information turned out to be incorrect. *Id*., ¶18. However, the parties were unable to correct the judge's misconceptions because he "did not provide the parties or their attorneys with … notice of his intent to conduct his investigation or the nature of his investigation and its results." *Id*., ¶17. The defendant was ultimately granted resentencing on the grounds that the sentencing court relied on inaccurate information, violating due process. *Id*., ¶20. The Judicial Conduct Panel, meanwhile, ordered a suspension, citing *Judicial Commission v. Calvert* to support its decision. *See* 2018 WI 68, 382 Wis. 2d 354, 914 N.W.2d 765.

In *Calvert*, a circuit court commissioner conducted an independent factual investigation, "which included engaging in ex parte communication," and made "false statements to the parties that any further calls to police about their dispute would result in disorderly conduct tickets." *Piontek*, 386 Wis. 2d 703, ¶34. The Judicial Conduct Panel determined that a 15-day suspension was

necessary because the commissioner's misconduct was "undeniably serious." *Calvert*, 382 Wis. 2d 354, ¶26. The Wisconsin Supreme Court agreed: "[A] judge's objectivity and impartiality are critical to the proper functioning of the judicial system," it held, and the commissioner in question was "far from objective and impartial." *Id*. His bias was evidenced by a range of misconduct, including that "[h]e independently investigated the facts of a case pending before him." *Id*.

Piontek and *Calvert* are disciplinary cases, not objective bias appeals. But they demonstrate the error in Judge O'Melia's ways, and they make clear that judicial neutrality requires abstaining from independent factual investigation. Judge O'Melia's sua sponte inquiry into Mr. LaRose's record—and his failure to notify the parties of his investigation or provide them with a chance to respond—contributed to the appearance of bias.

E. Judge O'Melia's discussion of a divorce he'd presided over just before Mr. LaRose's sentencing, and his related discussion of his all-encompassing hostility toward Mr. LaRose, suggest he was not impartial.

In addition to considering court documents that were not part of the record and that no party offered, Judge O'Melia repeatedly discussed a separate family law case he had presided over that morning. The mother of one of Mr. LaRose's biological children had gotten a divorce. Judge O'Melia said that, during the divorce hearing, he contemplated how it might in part be the product of Mr. LaRose's bad behavior—specifically his

choice to have sex with the woman in the divorcing couple even though she was married to someone else. Judge O'Melia then wondered out loud whether the woman might be one of Mr. LaRose's victims in this case. Finally, it said it made sure the man in the divorcing couple knew he wasn't their child's biological father.

There are a few problems here.

First, again, Judge O'Melia gave the parties no notice that he would be considering this outside-the-record information as an aggravating factor at Mr. LaRose's sentencing. So, they couldn't investigate the causes of the divorce to confirm or rebut Judge O'Melia's impression that Mr. LaRose's bad behavior was a contributing factor. That alone renders Judge O'Melia's consideration of the divorce improper. *Piontek*, 386 Wis. 2d 703, ¶37.

Second, there is no evidence that Mr. LaRose and the woman had nonconsensual sex. Nor is there any reason in the record to suspect that Mr. LaRose's sexual appetite led him to lure the woman away from her husband; the opposite might be true, or it may have been a two-way street. Why Judge O'Melia considered the woman a potential victim of Mr. LaRose's is therefore unclear. And because the woman's divorce and the circumstances surrounding her infidelity are irrelevant to Mr. LaRose's sentence (infidelity is not what imprisonment seeks to prevent or remedy), Judge O'Melia erred by taking them into account.

Finally, Judge O'Melia's focus on Mr. LaRose's "undesirable behavior patterns," and his assumption

that those patterns caused an extramarital affair and a divorce, betray an unconstitutional degree of antipathy toward Mr. LaRose. A reasonable person witnessing Mr. LaRose's sentencing—including Judge O'Melia's negative commentary on Mr. LaRose's personality and background, his consideration of information he personally gathered from outside the record, and his seemingly skewed interpretation of some of that information—would question whether a "fair judgment" was possible. *Liteky*, 510 U.S. at 555.

While ordinary "expressions of impatience, dissatisfaction, annoyance, and even anger" don't on their own prove bias, the appearance of bias is undeniable when a court makes statements based on "knowledge acquired outside" the record that reveal "unequivocal antagonism" toward the defendant. *Id*. at 556. That is what we have here.

F. The totality of Judge O'Melia's statements and actions surrounding Mr. LaRose's sentencing establish the appearance of bias. Thus, this Court should grant Mr. LaRose resentencing before a different judge.

The record is rife with reasons to question whether Judge O'Melia could preside impartially in this case. Under the totality of the circumstances, a reasonable person would not trust Judge O'Melia to "'hold the balance nice, clear, and true'" when sentencing Mr. LaRose. A reasonable person would instead conclude that he prejudged the need for imprisonment, drew a host of negative conclusions about Mr. LaRose

based on his own improper investigation into the facts, and felt such hostility toward Mr. LaRose that he may have been unable to assess (or bring himself to impose) the "minimum amount of … confinement … consistent with the protection 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 *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)). Accordingly, the record establishes the appearance of bias.

As noted above, when a defendant demonstrates the appearance of bias by a preponderance of the evidence, the error is structural; there is no such thing as harmless error in this context. *See Gudgeon*, 295 Wis. 2d 189, ¶20. Thus, Mr. LaRose is automatically entitled to be resentenced by a different judge. *See Goodson*, 320 Wis. 2d 166, ¶18.

CONCLUSION

Mr. LaRose respectfully requests that this Court reverse the circuit court's order denying postconviction relief and remand the case to the circuit court with instructions to vacate the judgment of conviction and hold a new sentencing hearing before a different judge.

Dated this 26th day of December, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b) and (c) for a brief. The length of this brief is 4,078 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 one or more initials or other appropriate pseudonym or designation 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 and filed this 26th day of December, 2022.

Signed:

Electronically signed by
Megan Sanders-Drazen

Megan Sanders-Drazen