STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP001424-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES WILLIAMS,

Defendant-Appellant.

Appeal from Orders Denying Postconviction Relief Entered in the Brown County Circuit Court, the Hon. Donald R. Zuidmulder, Presiding

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BRIEF OF DEFENDANT-APPELLANT

LUCAS SWANK
Assistant State Public Defender
State Bar No. 1103010

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177
swankl@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTE CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

> Is Mr. Williams entitled to withdraw his plea because he was not advised of and did not waive his right to be physically present for his plea hearing?

The circuit court denied Mr. Williams' motion, finding that it "did address [Mr. Williams] at one point in the proceedings about whether he wished to be physically present," (R.185:3; App.6), and referencing a waiver of appearance form that had been filed a year prior to the plea hearing. The court also stated that during the COVID-19 pandemic it "had hundreds of cases that I am trying desperately to respond to the defendants' pleas to me about moving their cases." (R.185:4; App.7).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Williams does not request oral argument.

Mr. Williams does not believe publication is warranted as this case can be decided on well-established caselaw.

STATEMENT OF THE CASE AND FACTS

This case is an appeal from an order denying Mr. Williams postconviction relief. (R.173; App.3).[1] Mr. Williams entered a plea of no contest to a count of second-degree sexual assault of a child in October 2022 and was sentenced two months later. (R.103:3; App.15; R.117).

Mr. Williams was originally charged in July 2020 and was held in-custody on a $10,000 cash bond throughout these proceedings. (R.2; R.6; R.122). Counsel was eventually appointed and immediately raised competency. (R.10; 12).

Mr. Williams was found to be incompetent and committed to the custody of DHS on April 7, 2021. (R.33). Mr. Williams was found competent on October 13, 2021. (R.127:2-3).

On January 3, 2022, trial counsel filed a plea questionnaire with the court. (R.57). At a hearing on January 10th, trial counsel noted the plea questionnaire and a waiver of right to personal appearance form[2] had been filed on October 28, 2021. (R.133:2; R.51; App.24). Mr. Williams appeared from the jail while all other parties were in-person. (R.133:2). The court noted that it did not "have any of this stuff" and went off the record to print the materials. (R.133:3).

[1] A second order denying another claim was issued later. (R.184).

[2] Court form CR-295.

The court asked: "Then, Mr. Williams, you previously indicated that you are waiving your right of personal appearance and are appearing via Zoom. Is that correct?" (R.133:4). Mr. Williams responded "Yeah." (R.133:4). During the plea hearing Mr. Williams stated he wanted to plead not guilty and go to trial. (R.133:4-5). The court stopped the plea and scheduled a trial date. (R.133:5).

At a February 24th final pre-trial, the court asked trial counsel where Mr. Williams was, and counsel replied "[h]e's in the Brown County Jail." (R.132:2).[3] The court then seemed to acknowledge Mr. Williams on Zoom.[4]

On March 21, 2022, trial counsel filed a motion to withdraw. (R.67). At a hearing the next day trial counsel described Mr. Williams' indecision regarding taking the plea deal and how he had gone back and forth several times. (R.145:3). To this, the court responded:

> Well, here's—my proposal would be, Mr. Wingrove, that if you want, I will order a personal appearance. So[,] I'll have him brought from the jail to my courtroom. We'll have the plea questionnaire and the waiver-of-rights form that he's previously filed. You can confer with him, then I'll come out, and he'd be right here. We'll all

[3] All other parties appear to have been in-person.

[4] This is unclear, because the court said "All right. And is he appearing—all right." The court would say: "Thank you, Mr. Williams" at the end of the hearing, but there was no other acknowledgement of him during the hearing.

> be together in the same room, and then you can either have confidence that he wishes to proceed or I guess we can address it in a way that we'll all feel comfortable.

(R.145:3). The court then told Mr. Williams "I'm gonna order that you be transported from the jail so that you'll be here with . . . Mr. Wingrove, and then we can take care of this." (R.145:4).

Two days later, all of the parties, including Mr. Williams, appeared in-person. (R.144:2). At that time, the court ordered a competency examination. (R.144:3-4). The court would again find Mr. Williams competent on June 27, 2022. (R.140:24).

In the interim, at an April 22, 2022 hearing, Mr. Williams again appeared by Zoom from the jail. (R.143:2). Shortly after the hearing started, trial counsel noted "Mr. Williams just joined us," and followed up that "[t]here's a CR-295 on file." (R.143:2). A similar interaction occurred at the next hearing on May 3rd, with counsel stating the CR-295 form was on file. (R.142:2).

At an August 9, 2022 hearing, Mr. Williams appeared in the courtroom. (R.139:2). At that hearing, when scheduling a final pre-trial, trial counsel said "I really would not want to call in[to] a final pretrial [for] something this big. I need to be there in person." (R.139:4).

A plea hearing was scheduled for October 13, 2022, where Mr. Williams and trial counsel both appeared via Zoom. (R.103:2; App.14). Trial counsel again noted "there is a CR-295 on file. It's document number 51 in the file. I reviewed that on October 22nd, 2021, with Mr. Williams. We did it through a COVID protocol." (R.103:2; App.14).

Regarding his own Zoom appearance, trial counsel stated that he was positive for COVID-19, and would not be able to go to the courthouse for another six days. (R.103:3; App.15; R.96). After accepting Mr. Williams' plea, the court "adjudge[d] him guilty of Count 2." (R.103:7; App.19). At the end of the hearing, while scheduling sentencing, the court would ask: "And then do you wish this to be in person, Mr. Williams? Do you wanna be brought to the courthouse for this?" Mr. Williams responded "Yeah." (R.103:8; App.20).

The court later sentenced Mr. Williams to 10 years of initial confinement and 6 years of extended supervision. (R.114; App.22-23).

Mr. Williams filed a postconviction motion arguing that he was entitled to plea withdrawal based on the court's failure to inform him of his right to be personally present for his change-in-plea and for failing to adequately address whether Mr. Williams was waiving his in-person appearance knowingly, voluntarily, and intelligently. (R.154:9-15).[5]

[5] Mr. Williams also asserted that he did not understand the maximum penalty he faced at the time he entered his plea;

The parties briefed the issues and the court held a hearing in January 2024. (R.154; R.164; R.165). At the hearing, the court denied Mr. Williams' personal appearance claim.[6] In doing so, the circuit court referenced the waiver of personal appearance form. (R.185:3-4; App.6-7; R.51; App.24). The court went on to say "I did address him at one point in the proceedings about whether he wished to be physically present." (R.185:3; App.6). The court further explained that due to the pandemic—which had been going on for nearly a year and a half at the time of the plea[7]—"defendants begged" to do remote plea hearings and it "had hundreds of cases that I am trying desperately to respond to the defendants' pleas to me about moving their cases." (R.185:3-4; App.6-7).

The court stated it would not "find that his plea taken that day, taken by my relying on his executing the—the form and my—my addressing him, was in

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thus, he was entitled to withdraw his plea because it was not made knowingly, voluntarily, and intelligently. (R.154:15-19). That issue is not raised on appeal.

[6] The latter half of the motion would later be denied following an evidentiary hearing in February 2024. (R.184); *supra* at 9n.5.

[7] The World Health Organization first declared COVID-19 a pandemic on March 11, 2020. https://www.cdc.gov/museum/timeline/covid19.html. CDC Museum COVID-19 Timeline (last accessed Oct. 14, 2020). The Supreme Court originally suspended in-person court appearances on March 22, 2020. In re the Matter of Remote Hearings During the COVID-19 Pandemic, Issued March 22, 2020, https://www.wicourts.gov/news/docs/remotehearings.pdf.

any way defective or in violation of any statutory or constitutional right in the historical context." (R.185:4; App.7).

This appeal follows.

ARGUMENT

Mr. Williams in entitled to withdraw his plea because he was not present for the plea hearing and did not waive his appearance.

Mr. Williams never waived his right to be present for the plea hearing, and the circuit court failed to address his remote appearance at all. As such, Mr. Williams is entitled to plea withdrawal.

A. Defendants have a right to withdraw their plea when they have not waived their right to an in-person appearance for the hearing where judgment is entered.

Defendants are entitled to be present at plea hearings where the court pronounces judgment, pursuant to Wis. Stat. § 971.04(1)(g). *State v. Soto*, 2012 WI 93, ¶27, 343 Wis. 2d 43, 817 N.W.2d 848. Defendants may waive their right to be present, which requires "the intentional relinquishment or abandonment of a known right." *Id.*, ¶35.

"To withdraw a plea after sentencing, a defendant must prove by clear and convincing evidence that plea withdrawal is required to correct a

manifest injustice. "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" *State v. Anderson*, 2017 WI App 17, ¶15, 374 Wis. 2d 372, 896 N.W.2d 364 (citing *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836) (internal citation omitted).

The Supreme Court in *Soto* held that the right to personal appearance "is particularly important to the actual or perceived fairness of the criminal proceedings." *Soto*, 343 Wis. 2d 43, ¶40. As such, the Court held that it may only be relinquished through waiver (rather than forfeiture). *Id.* Thus, the failure of a circuit court to establish a knowing, voluntary, and intelligent waiver is a manifest injustice.

Soto and *Anderson* established different levels of detail that courts must go into when establishing whether a defendant has waived their right to personal appearance. *Soto* involved a defendant who was in a courtroom with his attorney and videoconferencing was used by the judge who appeared remotely. *Anderson*, 374 Wis. 2d 372, ¶¶38-40. Anderson's hearing was done by telephone while he was in prison and thus separated from both the court and his attorney. *Id.*

In *Soto*, the Supreme Court held that circuit courts only need to establish that videoconferencing was working and that the defendant was knowingly, intelligently, and voluntarily waiving their personal appearance—done by asking if the defendant was okay appearing by video and by suggesting they could

refuse "to employ videoconferencing for a plea hearing at which judgment will be pronounced." *Soto*, 343 Wis. 2d 43, ¶¶46-49; *see Anderson*, 374 Wis. 2d 372, ¶33.

Anderson established a higher standard needed to be met, given the differences in the proceedings described above. This Court held:

> a valid waiver of the defendant's right to be present must be predicated upon a colloquy that unambiguously informs the defendant he or she has a right to be physically present for the plea hearing in the same courtroom as the presiding judge. In addition, the court must specifically inquire, as often and in whatever manner necessary under the circumstances, whether the defendant is able to hear and understand the court and the other participants.

Anderson, 374 Wis. 2d 372, ¶42.

This case is somewhere in the middle, as Mr. Williams was in the Brown County Jail and separated from his attorney, similar to *Anderson*, but appeared via video, like in *Soto*. However, Mr. Williams believes he is entitled to plea withdrawal under either standard.

B. Mr. Williams did not waive his right to personal appearance.

Nothing in the record suggests Mr. Williams waived his right to personal appearance, the court's implicit finding in that regard is clearly erroneous.

"A finding of fact is clearly erroneous if it is against the great weight and clear preponderance of the evidence. It is within the province of the factfinder to make determinations of the weight and credibility of evidence." *Lowe's Home Centers, LLC v. City of Delavan*, 2023 WI 8, ¶25, 405 Wis. 2d 616, 985 N.W.2d 69 (internal citation omitted).

Here, the court did not make any explicit findings that Mr. Williams was waiving his right to personal appearance. However, this finding is necessarily implied by the court denying his postconviction motion and the statement that Mr. Williams' plea was in no "way defective or in violation of any statutory or constitutional right in the historical context." (R.185:4; App.7).

However, the court's implicit finding is unsupported by the record. The only thing that could be construed as a waiver was the statement from trial counsel that "there is a CR-295 on file." (R.103:2; App.14). However, counsel "reviewed that on October 22nd, 2021, with Mr. Williams," almost a year before the plea hearing on October 13, 2022. (R.103:2; App.14). That single discussion a year prior was not sufficient to find that Mr. Williams waived appearance at every proceeding—including a possible jury trial—moving forward, let alone that he did so knowingly, voluntarily, and intelligently.[8]

[8] While the form includes a checkbox for waiving all future appearances, it also includes a box for waiving appearance at a specific hearing. (R.51; App.24). The latter

Additionally, there is no record that counsel discussed with Mr. Williams his right to be present in-person for the plea or that Mr. Williams wished to appear from the jail. Similarly, there is no record that Mr. Williams was given a copy of the waiver of personal appearance form. Thus, a finding that Mr. Williams waived his right to personal appearance was clearly erroneous and he is entitled to withdraw his plea.

C. The circuit court failed to ascertain whether Mr. Williams' remote appearance was waived knowingly, voluntarily, and intelligently.

If this Court finds that Mr. Williams waived his right to personal appearance, it should still find he is entitled to plea withdrawal, as the circuit court failed to ascertain—through colloquy or other means—that Mr. Williams was waiving his right to personal appearance.

In this case, it is arguable that the circuit court did not meet *Soto*'s requirement to "explore[] the effectiveness of the videoconferencing [] being employed" because it only established that Mr. Williams could hear the court. *Soto*, 343 Wis. 2d

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ensures a defendant understands they have a right to appear for that specific hearing, as such likely meets the requirements of *Soto*. When the "all future proceedings" box is checked, Mr. Williams contends that as more time passes and defendants are not reminded of their right to personal appearance a court's ability to rely on the form diminishes.

43, ¶46; (R.103:3; App.15). The court failed to confirm whether Mr. Williams could see the court or attorneys. The court also did not establish whether Mr. Williams could hear the attorneys. Finally, there is no record about whether Mr. Williams could meet privately with his attorney—he definitely was not informed of that possibility.[9]

Regardless, the court failed to "ascertain, either by personal colloquy or by some other means" that Mr. Williams consented to the use of videoconferencing. *Soto*, 343 Wis. 2d 43, ¶46. Quite simply, the court did not address Mr. Williams' appearance, let alone ascertain Mr. Williams was knowingly, voluntarily, and intelligently waiving his right to personal appearance. [10]

i. Vague reference to the personal appearance form was not sufficient to find waiver.

In denying Mr. Williams' postconviction motion, the court stated it relied on Mr. Williams executing the personal appearance form. (R.185:4; App.7). A passing reference by trial counsel to a form he reviewed with

[9] This record suggests that the colloquy standards from *Anderson* should apply because Mr. Williams was in-custody, separated from his attorney, and there is no record indicating the video worked on Mr. Williams' end. *See Anderson*, 374 Wis. 2d 372, ¶42.

[10] Also concerning is that the court's ascertainment was entirely retroactive, as it did not discuss the form nor the prior on-the-record discussion at the October 2022 plea hearing.

Mr. Williams one-year prior, (R.103:2; App.14), is insufficient to determine whether Mr. Williams was knowingly, voluntarily, and intelligently waiving personal appearance for that particular hearing.

The Supreme Court has held that plea questionnaire forms are not substitutes for in-person colloquies. *See State v. Hoppe*, 2009 WI 41, ¶¶31-33, 317 Wis. 2d 161, 765 N.W.2d 794 (holding that a Plea Questionnaire/Waiver of Rights Form "cannot substitute for an in-person, on-the-record plea colloquy"). While *Soto* allows the court to rely on "some other means," besides a colloquy, the purpose is still to ascertain whether a defendant understands their right to be present and the waiver of the right. *See Soto*, 343 Wis. 2d 43, ¶¶45-46.

Reliance on a form that was last discussed with a defendant one-year prior is not sufficient its own. This is especially so without evidence in the record that Mr. Williams was provided a copy of the form so he could be reminded that the form required him to notify the court in order to withdraw the purported waiver. (R.51; App.24).

Mr. Williams believes there are circumstances where reliance solely on a form might be appropriate without a colloquy. Some examples include:

- the form being signed and filed at the same time as the plea questionnaire, shortly before the hearing, and

- counsel stating that they discussed a previously filed form with their client ahead of the hearing.

In each of these examples, timeliness of the waiver is important. Both have some assurance that the defendant was recently informed of the right to appear in-person, meeting *Soto*'s requirement that it be suggested to the defendant they can refuse a remote appearance. *Soto*, 343 Wis. 2d 43, ¶46. Here, there was no such assurance of a timely reminder.

ii. The court's discussion with Mr. Williams in January 2022 did not establish a valid waiver in October 2022.

The court asking Mr. Williams if he "previously indicated that [he was] waiving [his] right of personal appearance and are appearing via Zoom" was insufficient to ascertain a knowing, voluntary, and intelligent waiver under *Soto*, especially in the context of this case.

In addition to referencing the form being on file, the court relied on it "addressing" Mr. Williams to find that his right to personal appearance was not violated. (R.185:4; App.7). However, the court ignored all of the times it did not address Mr. Williams' right to personal appearance after that, which undermines a finding that any waiver was knowing, voluntarily, and intelligent.

At a final pre-trial on February 24, 2022, the court asked trial counsel where Mr. Williams was, and counsel replied "He's in the Brown County Jail." (R.132:2).[11] The court then seemed to acknowledge Mr. Williams was appearing via Zoom. (R.132:2). The hearing proceeded with no further discussion of Mr. Williams' appearance.

Then, after going back-and-forth regarding entering a plea at the March 21, 2022 hearing, the court said it would "order a personal appearance" and have Mr. Williams brought to court and explained to Mr. Williams the same. *Supra* at 7-8; (R.145:3-4). Mr. Williams was brought to court for an in-person appearance two days later.

There were then two more hearings in April and May where Mr. Williams appeared by Zoom and counsel stated the personal appearance form was on file without Mr. Williams being addressed. *Supra* at 8; (R.143:2); (R.142:2).

Finally, there was a hearing on August 9, 2022 where Mr. Williams inexplicably appeared in-person with counsel by video. (R.139:2). At that hearing, counsel scheduled the next hearing for an in-person appearance, saying he would not want to appear by video for a final pre-trial. (R.139:4).

It was with this backdrop of a seemingly random mix of video and in-person appearances that the October 13, 2022 plea hearing occurred. Nine months

[11] All other parties appear to have been in-person.

prior was when the court last indicated to Mr. Williams he could decide whether to appear in-person. After that, there was multiple instances of counsel referencing a form only by number, a hearing where the court ordered Mr. Williams be in-person, and another hearing where Mr. Williams was brought to court and his attorney appeared by Zoom.

At no point after January 10, 2022, was there a discussion regarding Mr. Williams' desire of how to appear or his right to appear in-person for certain hearings.

To the extent the court actually relied on its January 10th question to Mr. Williams regarding his waiver of personal appearance, (R.185:3-4; App.6-7), the intervening mix of appearances and lack of colloquies makes the nine-month old question insufficient to ascertain "whether [Mr. Williams] knowingly, intelligently, and voluntarily consent[ed] to the use of videoconferencing." *Soto*, 343 Wis. 2d 43, ¶46.

Similar to the examples above, *supra* at 18-19, there are instances where the court does not address a defendant's remote appearance at the hearing itself that could be sufficient to establish a knowing, voluntary, and intelligent waiver. One example is where the court asks the defendant if they consent to appearing remotely for the next hearing during scheduling—similar to what the court did with sentencing in this case. (R.103:8; App.20).

Thus, while Mr. Williams believes there are situations where the court could rely on the CR-295 or not address a personal appearance at the hearing itself and still comply with *Soto*. However, the twelve months between when counsel discussed the form with Mr. Williams and the nine months between the court last suggested Mr. Williams could refuse a remote appearance are not sufficient under *Soto*. 343 Wis. 2d 43, ¶46; *supra* at 14n.8. As such, Mr. Williams is entitled to plea withdrawal.

D. *Anderson*'s higher standard applies.

To the extent this Court believes the record is sufficient to find Mr. Williams waived his right to personal appearance under *Soto*, Mr. Williams argues the standard in Anderson should apply, *supra* at 16n.9, and he in entitled to plea withdrawal.

Here, the court very clearly did not conduct "a colloquy that unambiguously informs the defendant he or she has a right to be physically present for the plea hearing in the same courtroom as the presiding judge," nor did the court "specifically inquire . . . whether [Mr. Williams was] able to hear and understand . . . the other participants." *Anderson*, 374 Wis. 2d 372, ¶42; *supra* at 15-16. As such, Mr. Williams should be allowed to withdraw his plea under the standard set forth in *Anderson*.

E. The pandemic would not have impacted Mr. Williams' appearance.

The COVID-19 pandemic did not meaningfully affect how Mr. Williams appeared. At the first postconviction hearing, the court stated "we should all now reflect that this is all really the result of the pandemic." (R.185:3; App.6). It went on to cite how other defendants were "writing me, calling me about they're sitting in the jail, nothing is happening, what can be done," (R.185:3; App.6), and that the court was "trying desperately to respond to the defendants' pleas to me about moving their cases." (R.185:4; App.7).

There are multiple issues with the court using COVID-19 as a scapegoat for its insufficient colloquy regarding Mr. Williams' personal appearance. Most plainly, the plea hearing occurred in October 2022, nearly 18 months after the pandemic began. On May 21, 2021, the Supreme Court had lifted its statewide guidelines—which only required masking, social distancing, and sanitization and did not bar in-person appearances.[12] In response, Brown County rescinded entirely its COVID-19 operational plan on June 2, 2021.[13] Also, the court never explained why

[12] In re the Matter of Modification of Circuit Court and Municipal Accommodations that were Required Because of the COVID-19 Pandemic, Issued May 21, 2021, https://www.wicourts.gov/supreme/docs/sco_modcircuitctmuniaccom.pdf.

[13] In the Matter of Brown County Circuit Court COVID-19 Operational Plan, Issued June 2, 2021, https://www.wicourts.gov/news/docs/brownreopen.pdf?v=2.

Mr. Williams was appearing by video due to the pandemic, but all other parties were present in the courtroom or why Mr. Williams was brought in-person twice before.

Second, all of the courts comments regarding what other defendants may or may not have done are irrelevant. There is no record that Mr. Williams ever indicated a desire for things to move quicker or that he was willing to appear by video if it meant he got to enter a plea sooner.

Finally, the Supreme Court authorized the use of operational plans for safely conducting in-person hearings on October 1, 2020.[14] According to the June 2nd order, Brown County implemented such a plan by at least October 20, 2020. Thus, there is no reason that Mr. Williams' right to a personal appearance would need to have been dispensed with in the name of the pandemic.[15]

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[14] In in re the Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trials, Suspension of Statutory Deadlines for Non-criminal Jury Trials, and Remote Hearings During the COVID-19 Pandemic, Issued May 22, 2020, Amended October 1, 2020, https://www.wicourts.gov/news/docs/adminorderamend.pdf.

[15] Moreover, if an in-person had not been possible—it clearly was—the court should have allowed Mr. Williams to decide between a remote appearance and a delay.

CONCLUSION

Soto and *Anderson* make clear that at a minimum, courts must ascertain whether a defendant has knowingly, voluntarily, and intelligently waived their right to personal appearance when they enter their pleas. Because Mr. Williams never waived that right, and because the court failed to ascertain whether any waiver was knowing, voluntary, and intelligent, Mr. Williams is entitled to withdraw his plea.

Dated this 14th day of October, 2024.

Respectfully submitted,

Electronically signed by Lucas Swank
LUCAS SWANK
Assistant State Public Defender
State Bar No. 1103010

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177
swankl@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 4,049 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 rules 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 or 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 this 14th day of October, 2024.

Signed:
Electronically signed by
Lucas Swank
LUCAS SWANK
Assistant State Public Defender