STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001585-FT

In the Matter of the Mental Commitment of H.V.:
ROCK COUNTY,

Plaintiff-Respondent,

v.

H.V.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. This Court should grant review to clarify that the rules of evidence regarding the inadmissibility of hearsay testimony apply during recommitment proceedings, as it does in original commitment proceedings.

2. This Court should grant review to clarify that a doctor cannot testify to dangerousness because it is a legal finding, and thus, no exception to hearsay regarding an expert's opinion applies to testimony on dangerousness.

CRITERIA FOR REVIEW

This case presents the Court with a real and significant question of federal and state constitutional law. *See* Wis. Stat. § 809.62(1r)(a). It also presents the Court with an opportunity to clarify the law regarding legal issues that are likely to recur unless resolved by this Court. *See* Wis. Stat. § 809.62(1r)(c)(3.).

A mental health commitment "for any purposes constitutes a significant deprivation of liberty" and therefore, "requires due process protections." *See also Langlade County v. D.J.W.*, 2020 WI 41, ¶¶42-43, 391 Wis. 2d 231, 942 N.W.2d 277.

As a means of enforcing the due process rights of individual's subject to involuntary mental health commitments, the county is required to prove by clear and convincing evidence that the individual subject to commitment is mentally ill, a proper subject for treatment, and dangerous. *Id.*

To prove dangerousness at a recommitment, the county may demonstrate, based on treatment records, "that the individual would be a proper subject of commitment if treatment were withdrawn." § 51.20(1)(am). However, the county must still prove the individual *is* dangerous at each extension of a commitment. *D.J.W.*, 391 Wis. 2d 231, ¶¶33-34.

Also, as a means of enforcing these due process rights, the rules of evidence require the exclusion of hearsay evidence unless an exception applies. *See Lessard v. Schmidt*, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972); *S.Y. v. Eau Claire County*, 156 Wis. 2d 317, 327-28 (Ct. App. 1990).

One exception to hearsay permits an expert to rely on hearsay "for the purposes of medical diagnosis or treatment" so long as it is "reasonably pertinent to diagnosis or treatment." § 908.03(4). However, the underlying hearsay is still inadmissible. *See* § 907.03; *S.Y.* 156 Wis. 2d 317, 327-28.

Here, the question this Court should answer is how do these rules of evidence apply during a recommitment proceeding where the standard for the county is different. And further, whether this exception to hearsay applies to a doctor's testimony

regarding dangerousness. Both of these issues are provoked by the court of appeals opinion in this case because it did not address the use of hearsay at this hearing.

In *S.Y.*, the court of appeals determined, at least in the context of an original commitment, a doctor's underlying hearsay testimony—like here, about an alleged dangerous act—is inadmissible based on § 907.03. But, since then, no published decisions have resolved the admissibility of hearsay evidence in recommitments, how the § 908.03(4) exception applies, or how dangerousness plays into this area, if at all.

What has happened since *S.Y.*, is that this Court has clarified two important issues about Chapter 51 proceedings. First, the recommitment standard in § 51.20(1)(am) still requires the county to prove *current* dangerousness, but they can do so through treatment records. *D.J.W.*, 391 Wis. 2d 231, ¶¶33-34. Second, that dangerousness is "not a factual determination, but a legal one based on underlying facts." *Id.*, ¶47.

How does the § 908.03(4) exception to hearsay apply to the recommitment standard? If a county can prove current dangerousness through the use of treatment records, then can a doctor testify to hearsay evidence from treatment records? If so, is the underlying hearsay still inadmissible and thus, cannot be relied on by the circuit court? In order for a circuit court to rely on such evidence, must the county introduce those authenticated records? *See S.Y.*,

156 Wis. 2d 317, 327-28. If not, how would trial counsel be able to effectively cross examine this doctor on her hearsay testimony without the records?

How does the § 908.03(4) exception to hearsay apply to evidence of dangerousness? If dangerousness is a legal finding–not a factual opinion on medical diagnosis or treatment—can a doctor testify to dangerousness at all, regardless of whether that testimony is hearsay? If a doctor may testify to her opinion on dangerousness, then does the exception permit her to make hearsay statements regarding alleged past dangerous acts or omissions? If so, is the underlying hearsay still inadmissible and thus, cannot be relied on by the circuit court?

Each of these questions deal with the significant due process rights of individual's facing recommitment, especially those like H.V. who are at risk of perpetual recommitments. (App. Br. 16-17). Functionally, both the counties and the circuit courts function only as a conduit for a doctor's "opinion" on dangerousness when the county presents only a doctor's hearsay testimony at these hearings. Even when committees attempt to challenge the use of hearsay, the court of appeals either refuses to address it or outright permits it.

This case offers the Court with the opportunity to uphold a committee's due process rights, hold counties to their burden of proof, enforce the inadmissibility of hearsay at recommitments, and

prohibit doctor's from offering testimony on dangerousness that is outside their medical expertise.

STATEMENT OF FACTS

H.V., a 54-year-old man with schizophrenia, has been subject to involuntary medication and commitment since 2014. He currently receives outpatient treatment through a community-based program in Rock County.

Because of his schizophrenia, H.V. experiences delusional and paranoid thinking, and lacks insight into his mental illness, with or without psychotropic medication. (245:7-8, 11, 13; App. 28-29, 32, 34). People with schizophrenia "have ongoing symptoms." (245:12; App. 33). While H.V.'s delusions may be "less intrusive" or "more manageable," they do not disappear. (245:12-13; App. 33-34). Indeed, H.V.'s baseline, even with psychotropic medication, includes delusions, paranoia, and lack of insight into his illness. (245:13; App. 34). However, having schizophrenia alone does not make a person dangerous. (245:16-17; App. 37-38).

As to dangerousness the county only presented testimony from two doctors. Dr. Black stated that in "December 2016," H.V. stopped taking medication and "ended up hospitalized." (245:9; App. 30). He also stated that this was a "pattern" since H.V. had first been committed in 2007, but gave no specifics about this pattern. (245:9; App. 30) Dr. Black opined that because of this pattern, if off of commitment, H.V.

would "decompensate" and become dangerous. (245:9-10; App. 30-31). Dr. Black stated that H.V. "has a history of acting out"—although again, Dr. Black does not get more specific. (245:10-14; App. 31-35). Dr. Black stated that in the past H.V. has been "unstable, decompensated" and was "hospitalized." (245:14; App. 35).

Dr. Taylor did not meet with H.V. for her report or testimony, but she has met with him before and testified in favor of his commitment at previous extension hearings. (245:19; 208; App. 40). Dr. Taylor claimed that H.V. would become dangerous if treatment were withdrawn because H.V. stopped taking his medication in 2016 and "decompensated." (245:23; App. 44). As Dr. Taylor began testifying to hearsay regarding alleged events in 2016, trial counsel objected. (245:23, 25, 26, 29; App. 44, 46, 47, 50). At first the county moved on. (245:23; App. 44). But at another objection by counsel, the court overruled. (245:25-30; App. 46-51).

During this part of Dr. Taylor's testimony, she alleged that a 2016 conviction was a result of H.V.'s paranoid thinking. (245:25; App. 46). Over counsel's objection, the court took judicial notice of a felony battery conviction from 2016 to which H.V. pleaded guilty, and reviewed the elements of the conviction. (245:26; App. 47). The court stated that "there's no more hearsay" if it was proven in 2016. (245:26; App. 47).

Dr. Taylor continued by stating that the conviction was "because of paranoid thinking that this person at the bar was having sex with an ex-wife." (245:28, 30; App. 49, 51). She also alleged that H.V. "verbally confronted somebody" in 2021 related to a similar delusion. (245:29; App. 50). Again, trial counsel objected to the hearsay testimony and the court overruled. (245:30; App. 51).

At the close of Dr. Taylor's testimony, the court noted that it limited "the references to past events by Dr. Taylor to the circumstances in the criminal conviction for which, the elements of the offense were admitted, and nothing beyond that." (245:34; App. 55).

Ultimately, the court found H.V. to be dangerous under "the second standard." (245:42; App. 63). The court stated that the "recency question" is "reduced on a recommitment proceeding." (245:40; App. 61). It found that there is a "substantial certainty" that H.V. would become dangerous because, "absent medication, his state of mind would be impaired" and his "dangerousness would increase..." (245:41; App. 62).

The court found that based on Dr. Taylor's testimony about the 2016 conviction, "he does feel the need to...lash out to protect someone." (245:41; App. 62). And, that, H.V.'s "altered view of reality" is "harmful." (245:42; App. 63). It also stated that "doctors are absolutely clear that without the medication this – what had happened is going to happen again." (245:42; App. 63).

On appeal, H.V. challenged the sufficiency of the county's evidence that he is currently dangerous. H.V. alleged that the county's evidence of dangerous acts consisted only of Dr. Taylor's hearsay testimony. (App. Br. 7-13). The rest of the doctors' testimony on dangerousness was simply that H.V. would stop treatment without a court order and the vague assertion that H.V. would "decompensate." (App. Br. 7-13). H.V. argued that, given *D.J.W.*, the county failed to meet is burden of proof with admissible evidence that is specific to H.V. 391 Wis. 2d 231, ¶¶40-45, 47, 53.

Otherwise, the rest of the doctor's testimony consisted of testimony about H.V.'s mental illness and their opinions that, without a court order, H.V. would stop treatment which would result in the vague assertion that H.V. would "decompensate." (App. Br. 7-13). H.V. argued, given the inadmissibility of the objected to hearsay, and the failure of the county to provide any admissible and specific evidence that H.V. would become dangerous without treatment, the county failed to meet its burden under *D.J.W.*, 391 Wis. 2d 231, ¶¶40-45, 47, 53.

The county claimed that to prove dangerousness on recommitment, they only need to demonstrate that H.V. would not participate in treatment without court order and "his treatment history of dangerous behaviors when not in treatment." (Resp. Br. 8). As to the "dangerous behaviors" in H.V.'s treatment history, the county argued that Dr. Taylor's testimony was not hearsay because she is an expert and "expert[s] [are]

permitted to share their professional opinion with the finder of fact." (Resp. Br. 9).

The court of appeals affirmed. *Rock County v. H.V.*, 2022AP1585-FT, ¶1 (January 20, 2022); (App. 3-19). First, it "decline[d] to consider" whether Dr. Taylor's testimony is hearsay because H.V. did not "develop an argument as to why Dr. Taylor's expert opinion on [the alleged factual basis for H.V.'s 2016 conviction and its purported relationship to H.V.'s mental illness] is hearsay." *Id.* ¶23-25; (App. 12-13). The court stated that, "H.V. does not question Dr. Taylor's credentials...nor does he offer any evidence as to the source of Dr. Taylor's opinions so that a reviewing court may determine whether her testimony on these points constitute hearsay." *Id.*, ¶25; (App. 13).

Second, it held that the evidence was sufficient to prove dangerousness. *Id.*, ¶27; App. 14. It relied on the doctor's testimony regarding H.V.'s symptoms of schizophrenia, their opinion that H.V. would stop treatment without court order, and Dr. Taylor's testimony regarding what allegedly occurred in 2016. *Id.*, ¶27-30; (App. 14-16).

This petition for review follows.

ARGUMENT

Once again, the county failed to introduce admissible evidence specific to H.V. to prove he is currently dangerous. (207); (245; App. 22-67). Instead, the county relied on Dr. Taylor's inadmissible hearsay testimony alleging the factual basis for a criminal conviction from 2016. This same hearsay testimony was given at the recommitment proceeding the year before. (207).

However, the court of appeals has again refused to address the repeated reliance on this hearsay testimony to perpetually recommit H.V. *See Rock County v. H.V.*, 2021AP1760-FT, unpublished op., (Wis. Ct. App. January 13, 2022); App. 68-83.

H.V.'s cases are not the only example of this in the court of appeals. *See e.g. Rock County v. H.V.*, 2021AP1760-FT, unpublished op., (Wis. Ct. App. January 13, 2022); *Rock County v. J.B.*, 2021AP1157, unpublished op., (Wis. Ct. App. April 14, 2022); *Waukesha County v. I.R.T.*, No. 2020AP996-FT, unpublished op., (Wis. Ct. App. Nov. 4, 2020); *Rock County v. J.J.K.*, No. 2020AP1085, unpublished op., (Wis. Ct. App. April 29, 2021); (App. 68-133).

The most recent published decision regarding a doctor's hearsay testimony on dangerousness is from 1990. *S.Y.*, 156 Wis. 2d 317, 327-28. But in *S.Y.*, the court of appeals addressed the erroneous admission of a doctor's hearsay testimony at an original commitment long before this Court clarified the recommitment standard or clarified that

dangerousness is a legal finding. *Id.*; *see also D.J.W.*, 391 Wis. 2d 231, ¶¶33-34, 47.

Despite *S.Y.*, the courts have been permitting the county to present only the testimony from a doctor regarding each element of the recommitment standard, including dangerousness. Without clear guidance from this Court about how hearsay and its exceptions apply during a recommitment proceeding, especially as it pertains to dangerousness, this will continue without meaningful review from the court of appeals.

I. This Court should grant review to clarify that the rules of evidence regarding the inadmissibility of hearsay testimony apply during recommitment proceedings, as it does in original commitment proceedings.

A. The recommitment standard.

Wisconsin has long recognized that the deprivation of one's constitutionally protected interest in life, liberty, or property without due process of law is unconstitutional. *Milewski v. Town of Dover*, 2017 WI 79, ¶20, 377 Wis. 2d 38, 899 N.W.2d 303 (citing *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). A mental health commitment "for any purposes constitutes a significant deprivation of liberty" and therefore, "requires due process protections." *J.W.K.*, 386 Wis. 2d 672, ¶16. (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). *See also Langlade County v. D.J.W.*, 2020 WI 41, ¶¶42-43, 391 Wis. 2d 231, 942 N.W.2d 277.

Due process protections in cases of commitment require the county to prove "by clear and convincing evidence" that the individual subject to commitment is mentally ill, a proper subject for treatment, and dangerous. *Id.* (quoting *Foucha v. Louisana*, 504 U.S. 71, 80 (1992)). Thus, "[a] finding of 'mental illness alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

Furthermore, the five standards of dangerousness detailed in the statute require the county to "identify *recent* acts or omissions demonstrating that the individual *is* a danger to himself or to others." *See* Wis. Stat. § 51.20(1)(a)2.a.-e. (Emphasis added). This case is concerned with the second standard of dangerousness. *See* Wis. Stat § 51.20(1)(a)2.b.

When establishing recent acts of dangerousness for a recommitment, the county may demonstrate, based on treatment records, "that the individual would be a proper subject of commitment if treatment were withdrawn." § 51.20(1)(am). However, the county must still prove the individual *is* dangerous at each extension of a commitment. *D.J.W.*, 391 Wis. 2d 231, ¶¶33-34. "It is not enough that the individual was at one point dangerous." *Id.* The "elements or quantum of proof required" of the county to prove *current* dangerousness still remains. *Id.* When the county fails to demonstrate current dangerousness, the commitment is unconstitutional. *Id.*

Whether the county has met its burden of proof is a mixed question of law and fact. *Waukesha County v. J.W.J.*, 2017 WI 51, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. A circuit court's findings of fact are upheld unless found to be clearly erroneous. *Id.* Whether the facts satisfy the statutory standard is a question of law that is reviewed de novo. *Id.*

B. Hearsay in Chapter 51 proceedings.

Hearsay is any out of court statement offered to prove the truth of the matter asserted. *See* § 908.01(3). It is generally inadmissible because hearsay by nature is unreliable and it implicates the due process right to confront and cross examine witnesses at a commitment hearing. *Vitek v. Jones*, 445 U.S. 480, 494 (1980). Given the liberty interests at stake in commitment hearings, due process requires a strict adherence to the rules of evidence. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972). As such, hearsay is inadmissible evidence at commitment hearings unless an exception applies. *See* Wis. Stat. § 908.02.

One exception to hearsay permits an expert to rely on hearsay "for the purposes of medical diagnosis or treatment" so long as it is "reasonably pertinent to diagnosis or treatment." § 908.03(4). However, the underlying hearsay is still inadmissible. *See* § 907.03; *S.Y.* 156 Wis. 2d 317, 327-28.

In *S.Y.*, an expert who had limited personal contact with the subject of a commitment proceeding testified to the factual basis for S.Y.'s alleged dangerousness using facts she reviewed in medical reports. *Id.* She stated that these medical reports indicated that S.Y. had assaulted another person unprovoked. *Id.* However, the county never authenticated those medical records nor offered them into evidence. *Id.* at 328. Thus, the court of appeals held that the admission of the doctor's hearsay testimony about the alleged assault was erroneous. *Id.*

C. This case presents the Court with an opportunity to clarify how hearsay and its exceptions apply in recommitment proceedings.

Similar to *S.Y.*, Dr. Taylor alleged the factual basis for H.V.'s 2016 conviction and it's connection to H.V.'s mental illness *despite* having limited personal contact with H.V. and no first-hand knowledge. The county also failed to introduce any authenticated treatment records regarding these allegations. Thus, under *S.Y.*, Dr. Taylor's testimony is straightforwardly hearsay.

Yet, the court of appeals declined to address this issue by claiming that H.V. presented an undeveloped argument on hearsay. *H.V.*, 2022AP1585-FT, ¶23-24. Specifically, the court of appeals asserted that H.V. had to prove the "source of Dr. Taylor's information and why her testimony on these points is hearsay." *Id.*

The hearsay statute prohibits the admission of "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 908.01(3). It does not require H.V. to prove the source of the hearsay. It requires him to prove that the doctor lacked personal knowledge of the information testified to. It is undisputed that the doctors were not present when the 2016 battery occurred.

The issue still remains as to whether Dr. Taylor can testify to this hearsay because she is an expert. The county claims that these factual statements to prove dangerousness are part of her "expert opinion." And § 908.03(4) appears to carve out an exception for "statements made for purposes of medical diagnosis or treatment" so long as it is "reasonably pertinent to diagnosis and treatment."

Yet, according to *S.Y.* the underlying hearsay testimony is still inadmissible. *See* § 907.03; *see also State v. Weber*, 174 Wis. 2d 98, 496 N.W.2d 762 (Ct. App. 1993) (holding that while opinion evidence may be based upon hearsay, the underlying hearsay may not be admitted unless otherwise admissible).

Further, the issue still remains as to how hearsay functions at recommitment hearings due to the different standard. The county claims that the recommitment standard requires only a doctor's testimony as to what is contained in the treatment records. If this is true, then hearsay does not apply to recommitment hearings in the same way it does at

original commitment hearings or any other trial or hearing that abides by due process. *See Id.*

The court of appeals did not resolve any issues related to hearsay in this case. But the use of hearsay at recommitments will continue to present itself simply due to counties relying solely on doctor's testimony. *See e.g. Rock County v. H.V.*, 2021AP1760-FT, unpublished op., (Wis. Ct. App. January 13, 2022); *Rock County v. J.B.*, 2021AP1157, unpublished op., (Wis. Ct. App. April 14, 2022); *Waukesha County v. I.R.T.*, No. 2020AP996-FT, unpublished op., (Wis. Ct. App. Nov. 4, 2020); *Rock County v. J.J.K.*, No. 2020AP1085, unpublished op., (Wis. Ct. App. April 29, 2021); (App. 68-133). Thus, this case presents the Court with the opportunity to finally resolve this issue.

II. This Court should grant review to clarify that a doctor cannot testify to dangerousness because it is a legal finding, and thus, no exception to hearsay regarding an expert's opinion applies to testimony on dangerousness.

Frequently, the only contested issue in a Chapter 51 proceeding is whether that person is dangerous. As previously mentioned, the statute lays out five standards of dangerousness that identify various acts or omissions that demonstrate that the individual is currently dangerous.

The five standards of dangerousness are:

> (a) Substantial probability of physical harm to self, as shown by recent threats or attempts at suicide or serious bodily self-harm,
>
> (b) Substantial probability of physical harm to others, as manifested by recent homicidal or other violent behavior, or by a recent overt act, attempt or threat to do harm that reasonably places others in fear,
>
> (c) Substantial probability of physical impairment or injury to self or others because of impaired judgment, as manifested by a pattern of recent acts and omissions,
>
> (d) Inability to satisfy basic needs for nourishment, medical care, shelter or safety creating a substantial probability of imminent death or serious physical injury, debilitation, or disease as manifested by recent acts or omissions, and
>
> (e) Substantial probability of loss of ability to function independently or loss of control over thoughts or actions, due to an inability to express or apply an understanding of the advantages, disadvantages and alternatives to medication or treatment.

See Wis. Stat. § 51.20(1)(a)2.a.-e.

In H.V., only the doctors testified as to each element of H.V.'s recommitment, including dangerousness. The circuit court found H.V. to be dangerous based on Dr. Taylor's testimony that "what

had happened" in 2016 would happen again if treatment were withdrawn. (245:41-42; App. 62-63).

As demonstrated above, Dr. Taylor's allegations related to 2016 were hearsay. But, it was also testimony as to dangerousness. Throughout its brief, the county claims that a doctor can testify to an "expert opinion" on dangerousness. (Resp. Br. 6-8). However, *D.J.W.* makes it explicitly clear that dangerousness is a legal finding, not a factual determination. Therefore, no doctor, especially in the area of psychology and psychiatry, can offer opinion testimony as to someone's alleged dangerousness. 391 Wis. 2d 231, ¶47; *see also Satterwhite v. Texas*, 486 U.S. 249 (1988) (holding that the use of medical testimony regarding future dangerousness at a capital sentencing proceeding violates the Sixth Amendment).

If a doctor is permitted to testify to hearsay during a recommitment proceeding, it must still be "reasonably pertinent to medical diagnosis or treatment." § 908.03(4). Dangerousness, being a legal finding, is not a medical opinion; no matter the expert's credentials, they cannot offer expert opinion on a legal determination which must be made by the circuit court.

Further, factual testimony—such as the factual basis for a criminal conviction—is not opinion testimony. It is the same factual information to which a lay witness can testify. Then, it appears that § 908.03(4) or § 907.03 would not allow a doctor,

regardless of her credentials, to provide factual, lay testimony that she has no first-hand knowledge of.

Again, the court of appeals did not address these issues with hearsay, even though it was discussed by counsel on both sides. Without clear guidance from this Court, these questions on how hearsay functions at recommitments, including how it applies to a doctor's testimony regarding dangerousness, will continue to avoid meaningful review, as it did here.

Hearsay is a repeated concern in Chapter 51 proceedings. But the most recent decision on hearsay in a Chapter 51 hearing was published in 1990. Since then, the court of appeals has avoided the issue or permitted its use without clear, published direction on any of the issues addressed in this petition.

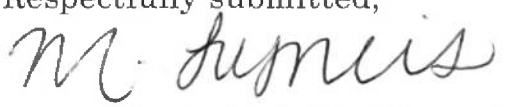
This Court should take this opportunity to clarify the law on hearsay as it relates to Chapter 51 recommitment proceedings and dangerousness. In doing so, the Court will have the opportunity to meaningfully hold the county to its burden and uphold the due process rights of individuals subject to commitments across Wisconsin. "Although protecting people from harm is important, so is due process." *Dodge County v. Ryan E.M.*, 2002 WI App 71, ¶11, 252 Wis. 2d 490, 642 N.W.2d 592.

CONCLUSION

For these reasons, H.V. respectfully requests that this Court grant this petition for review so as to uphold his due process protections guaranteed to him during any hearing on his commitment.

Dated this 20th day of February, 2023.

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 (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 4,119 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including 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 this 20th day of February, 2023.

Signed:

M. Lyneis

MEGAN ELIZABETH LYNEIS
Assistant State Public Defender