IN THE
SUPREME COURT OF MISSOURI

No. SC95953

PAUL GITTEMEIER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Warren County Circuit Court
Twelfth Judicial Circuit
The Honorable Wesley C. Dalton, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

Respectfully Submitted,

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Standard of Review

"When a motion court overrules a motion claiming abandonment by post-conviction counsel, appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous." *Vogl v. State*, 437 S.W.3d 218, 224 (Mo. 2014). "The motion court's findings and conclusions are clearly erroneous only if, after review of the record, the appellate court is left with the definite and firm impression that a mistake has been made." *Stanley v. State*, 420 S.W.3d 532, 539 (Mo. 2014) (citing *Cooper v. State*, 356 S.W.3d 148, 152 (Mo. banc 2011) and *Eastburn v. State*, 400 S.W.3d 770, 773 (Mo. banc 2013)). "Movant has the burden to show by a preponderance of the evidence that the motion court clearly erred in its ruling." *Id*. Of course, this standard of review is not especially germane to the actual issue in this case, or the reason the appellate court and members of the bar seek and need guidance as to whether the distinction between retained and appointed counsel was meant to deprive those who retain counsel from relief under the abandonment doctrine created in *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991) and *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991).

When interpreting Rule 29.15, the Court is "guided by the same standards as those used in the construction of statutes." *Rohwer v. State*, 791 S.W.2d 741, 743 (Mo. Ct. App. 1990). "Construction of a statute is a question of law, not judicial discretion." *State v. Haskins*, 950 S.W.2d 613, 615 (Mo. Ct. App. 1997). "A statute is to be given that interpretation which corresponds with the legislative objective and, where necessary, the

strict letter of the statute must yield to the manifest intent of the legislature." *State v. Williams*, 693 S.W.2d 125, 127 (Mo. Ct. App. 1985). "[The Court's] primary object is to ascertain the intent of the framers of the rule from the language used, and to give effect to that intent." *Rohwer*, 791 S.W.2d at 743. "To do so, the words of the rule are considered in their plain and ordinary meaning." *Id*. When a rule can be read differently by reasonably well-informed persons, the rule is ambiguous; courts will look beyond the plain and ordinary meaning of a rule when its meaning is ambiguous. *See Haskins*, 950 S.W.2d at 615-16.

ARGUMENT

I. THE ABANDONMENT DOCTRINE APPLIES TO ALL POSTCONVICTION COUNSEL.

The issue before this Court is whether Appellant was abandoned by his retained postconviction counsel when counsel failed to timely file Appellant's amended motion due to no fault of Appellant. The State contends that, because Appellant's postconviction counsel was retained (and not appointed), the abandonment doctrine and the obligations of Rule 29.15(e) do not apply. The State fails to address a number of issues that arise from its interpretation of the rule. The State's proposed application of the abandonment doctrine: (A) is based on a faulty interpretation of case law; (B) is unconstitutional and contrary to the rulings of this Court, the Supreme Court of the United States, and Article I, Section 14 of the Missouri Constitution; (C) will have serious and unfair consequences

to our system of justice; and (D) ignores the application of similar postconviction rules in other states.

A. The State's proposed application of the abandonment doctrine is based on a faulty interpretation of case law.

The issue of whether the court-created abandonment doctrine applies exclusively to appointed postconviction counsel, or whether it encompasses retained postconviction counsel, has never been addressed by this Court. However, the State is convinced that, for the first time since the abandonment doctrine's creation, the holding in *Price v. State*, 422 S.W.3d 292 (Mo. 2014) is to be interpreted to apply the abandonment doctrine only to the failures of appointed counsel. The State's interpretation of *Price* is unreasonable for at least three reasons.

First, the language in *Price* is merely *obiter dicta*.[1] "The Constitution requires the courts of appeal to follow our prior controlling decisions, but it does not require that they follow mere dicta of this court." *State ex rel. Anderson v. Hostetter*, 140 S.W.2d 21, 24 (Mo. banc 1940) (citations omitted). The issue in *Price* was whether the abandonment

[1] "Obiter dicta, by definition, is a gratuitous opinion. Statements are obiter dicta if they are not essential to the court's decision of the issue before it." *Davison v. Dairy Farmers of Am., Inc.*, 449 S.W.3d 81, 86 (Mo. Ct. App. 2014) (citing *Richardson v. QuikTrip Corp.*, 81 S.W.3d 54, 59 (Mo.App.W.D.2002). *See also Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo.App.W.D.2003) (holding that following *dicta* from another opinion would result in "error").

doctrine applied when Price's retained counsel failed to timely file an **initial motion**. *See Price*, 422 S.W.3d at 297. The issue of whether the abandonment doctrine applies to retained counsel's failure to timely file an **amended motion** was never raised or even addressed by the Court. The Court explained that "the abandonment doctrine was created to excuse the untimely filing of **amended motions** by appointed counsel under Rule 29.15(e)." *Id*. (emphasis in original). "The rationale for this excuse does not apply to untimely **initial motions**, and the purposes of Rule 29.15(b) would not be served by extending this doctrine to such circumstances." *Id*. (emphasis in original).

Second, the language of *Price* does not support the State's argument. In its brief, the State relies on the following quotation: "When counsel is appointed under Rule 29.15(e), this rule requires this counsel to investigate the claims raised in the inmate's timely initial motion and then file either an amended motion or a statement explaining why no amended motion is needed." *Id*. A plain and ordinary interpretation of this quote suggests that when counsel is appointed, Rule 29.15(e) imposes certain duties on appointed counsel. The quoted language does not suggest that the duties in Rule 29.15(e) are **only** applicable to appointed counsel; rather, the Court merely states that when counsel is appointed, appointed counsel has certain obligations. The Court did not state that the abandonment doctrine and the provisions of Rule 29.15(e) do not apply to counsel that is retained, nor did it even consider the circumstances that arise in this case, where Appellant was initially appointed counsel and his family subsequently retained counsel.

Third, this Court and the appellate courts[2] have never interpreted the holding of *Price* in a manner consistent with the State's argument. In *Barton v. State*, the Court stated: "*Price* held that a claim of abandonment by counsel does not apply to untimely **initial motions**, as those motions are to be filed by the movant, not by counsel." 486

[2] There is an abundance of post-*Price* appellate cases that apply the abandonment doctrine to "postconviction counsel" without reference to whether counsel is retained or appointed. *See, e.g., Watson v. State*, No. ED 103245, 2016 WL 6236630, at *2 n.4 (Mo. Ct. App. Oct. 25, 2016) ("The Missouri Supreme Court has limited the scope of abandonment claims to cases in which **post-conviction counsel** essentially takes no action on a movant's behalf or fails to file an amended motion in a timely manner, and the court has repeatedly declined to expand its scope.") (emphasis added); *James v. State*, 477 S.W.3d 190, 193 (Mo. Ct. App. 2015) ("Abandonment occurs (1) when **post-conviction counsel** takes no action on a movant's behalf with respect to filing an amended motion and as such the record shows that the movant is deprived of a meaningful review of his claims; or (2) when **post-conviction counsel** is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner.") (emphasis added); *Hicks v. State*, 473 S.W.3d 204, 207 (Mo. Ct. App. 2015) ("Where the record reflects that **post-conviction counsel** failed to comply with the requirements set out in Rule 24.035(e), raising a presumption of abandonment, the motion court must undertake an independent inquiry into the performances of both the movant and counsel.") (emphasis added).

S.W.3d 332, 338 (Mo. 2016), *reh'g denied* (May 24, 2016) (emphasis in original). The Court in *Barton* elaborated on its interpretation of *Price* by stating:

> *Price* thereby makes clear that while the precise circumstances constituting abandonment naturally may vary, the categories of claims of abandonment long have been fixed: in general "abandonment is available 'when (1) **post-conviction counsel** takes no action on movant's behalf with respect to filing an amended motion ... or (2) when **post-conviction counsel** is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner.'"

Id. (citing *Crenshaw v. State*, 266 S.W.3d 257, 259 (Mo. 2008); *Barnett v. State*, 103 S.W.3d 765, 773–74 (Mo. banc 2003); and *Moore v. State*, 934 S.W.2d 289, 291 (Mo. banc 1996) (emphasis added). "*Luleff* and *Sanders* held that claims of abandonment by **post-conviction counsel** in violation of Rule 29.15(e), 29.16 or 24.035(e) are cognizable." *Barton*, 486 S.W.3d at 337 (emphasis added). "[The postconviction rules] require the appointment of counsel when a defendant is indigent, but neither they nor any Missouri statute provides a defendant with a right to file a new or amended motion if his or her appointed or **retained post-conviction counsel** was ineffective." *Id*. at 336 (emphasis added). The holding in *Barton* certainly suggests that the language used in *Price* was not intended to create an unprecedented and uncalled for paradigm shift in postconviction cases.

B. The State's proposed application of the abandonment doctrine is unconstitutional and contrary to the rulings of this Court, the Supreme Court of the United States, and Article I, Section 14 of the Missouri Constitution.

The United States Supreme Court has "consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Bounds v. Smith*, 430 U.S. 817, 824 (U.S. 1977). "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate . . . ." *Anders v. State of Cal.*, 386 U.S. 738, 744 (1967). "[A] client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Maples v. Thomas*, 132 S. Ct. 912, 924 (2012). "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

The State argues that "[Appellant] must bear the consequences of his retained counsel's failure to timely file an amended motion." Respondent's Substitute Brief ("Resp. Br.") at 29. This is comparable to the argument addressed in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). There, the petitioner argued that "defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel." *Id*. at 344. The Court rejected the argument, stating that "we see no basis for drawing a distinction between retained and appointed counsel that would deny **equal**

justice to defendants who must choose their own lawyers." *Id*. at 344-45. (emphasis added). The Court further stated that:

> "A rule which would apply one fourteenth amendment test to assigned counsel and another to retained counsel would produce the anomaly that the non-indigent, who must retain an attorney if he can afford one, would be entitled to less protection . . . . The effect upon the defendant—confinement as a result of an unfair state trial—is the same whether the inadequate attorney was assigned or retained."

Id. at 345 n.9 (quoting *U. S. ex rel. Hart v. Davenport*, 478 F.2d 203, 211 (3d Cir. 1973).

The State's proposed application of the abandonment doctrine also violates the open courts provision of the Missouri Constitution. The open courts provision of the Missouri Constitution provides: "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Mo. Const. art. I, § 14. "'[S]tatutes that impose procedural bars to access of the courts are unconstitutional,' and any 'law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action . . .' violates the open courts provision." *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. banc 2009) (quoting *Wheeler v. Briggs*, 941 S.W.2d 512, 514 (Mo. banc 1997), and *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000)) (citation omitted). "An open courts violation is established on a showing that: '(1) a party has a recognized cause of action; (2) that the

cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.'" *Id*. (quoting *Snodgras v. Martin & Bayley, Inc*., 204 S.W.3d 638, 640 (Mo. banc 2006)).

The State argues that restricting Appellant from filing an untimely amended motion is not arbitrary or unreasonable, and thus is not an open courts violation. Resp. Br. 33. The State accurately states that "the imposition of time limits on the filing of either the initial or amended motion is not arbitrary or unreasonable." *Id*. However, the State entirely disregards the concept that its proposed application of the abandonment doctrine permits indigent movants, who untimely file an amended motion, access to the courts, while simultaneously restricting access to the courts for movants with retained counsel. Restricting a movant access to the courts, when the movant has a meritorious claim, on the basis of financial income is patently arbitrary. This restriction is also unreasonable in light of the serious and unfair consequences to the dispensing of justice without a logical explanation for such a distinction.

C. The State's proposed application of the abandonment doctrine will have serious and unfair consequences to our system of justice.

The State contends, without any factual support, that its proposed application of the abandonment doctrine would have a "negligible" impact on the Public Defender's caseload without challenging the facts set out in the *amicus curiae* briefs filed in support of Appellant. Resp. Br. 31-32. This argument rests on several faulty suppositions. First, the State contends that "the relatively small number of criminal defendants with the means to retain counsel for a postconviction action would probably be ineligible for

public defender services in the first place." Resp. Br. 31. The State failed to provide any authority or facts supporting this claim; rather, the State curiously cites to *Bennett v. State*, 88 S.W.3d 448, 450 (Mo. 2002). Nowhere in the *Bennett* opinion does this Court discuss the frequency of criminal defendants with (or without) the financial means to retain counsel. Furthermore, Appellant's circumstances refute this claim, as he was appointed counsel, and thus was eligible for public defender services, and then his family later provided the monetary resources to retain private counsel.

Second, the State contends that postconviction movants "would not base their decision [to retain counsel] on whether counsel might untimely file their amended motion." Resp. Br. 31. While one can only speculate as to the thought process of a postconviction movant, it is undeniable that the negative implications of retaining counsel should be included in any analysis. Private attorneys may even be ethically obliged to inform prospective clients that their best interests can only be guaranteed by appointed counsel. *See* Rule 4-1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

Third, the State contends that Appellant's, and the *amicus curiae*, arguments regarding the negative impact on the Missouri Public Defender's Office is merely a "red herring." Resp. Br. 32. However, the State's position disregards one of the reasons the Eastern District transferred this case to this Court: to address the "challenges to the public-defender system in the post-conviction process." *Gittemeier v. State*, No. ED 103189, 2016 WL 5107095, at *6 n.7 (Mo. Ct. App. Sept. 20, 2016). The potential

impact on the Public Defender's Office is discussed at length in the *amicus curiae* briefs[3], and the State's attempt to dismiss these arguments as a "red herring" is insulting and a logical fallacy in and of itself. It is the State's argument that smells of fish.

D. The State's proposed application of the abandonment doctrine ignores the application of similar postconviction rules in other states.

Missouri's rules for postconviction relief are remarkably similar to those in our sister states and, like those, are meant to ensure a "thorough review without undue delay in achieving finality of criminal convictions." *Price*, 422 S.W.3d at 297.[4] The State's argument preserves finality at the expense and destruction of any sense of justice or fair play. Because the issue in this case is one of first impression in Missouri, it is appropriate to see how the issue is examined by other states with similar rules. *See, e.g., Valter v. Orchard Farm Sch. Dist.*, 541 S.W.2d 550, 555 (Mo. 1976) (where this Court "considered the other out-of-state cases cited and relied on by plaintiff.")

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[3] *See* Joint Brief of *Amicus Curiae* filed by Denise L. Childress of the Missouri Association of Criminal Defense Lawyers and the Missouri Society for Criminal Justice; *see also* Brief of *Amicus Curiae* filed by Anthony E. Rothert and Gillian R. Wilcox of the American Civil Liberties Union of Missouri Foundation.

[4] In *Price*, there was a four-year delay in the filing of the movant's initial Rule 29.15 motion, which is an obvious affront to the desired concept of finality. In this case, the delay in the movant's amended motion was a matter of months, and certainly was not the antithesis of finality that the Court was presented with in *Price*.

In *People v. Cotto*, 51 N.E.3d 802, 810 (Ill. 2016), the Supreme Court of Illinois sensibly held that "[b]oth retained and appointed counsel must provide reasonable assistance to their clients after a petition is advanced from first-stage proceedings." In an attempt to distinguish *Cotto*, the State wrongfully stated that "[t]he 'reasonable assistance' requirement found in Illinois law is the equivalent of requiring the 'effective assistance' of postconviction counsel." Resp. Br. 30. However, this directly conflicts with the language in *Cotto*. For instance, the *Cotto* court expressly stated, "[a]s we have noted, there is no constitutional right to effective assistance of postconviction counsel. Consequently, the reasonable level of assistance provided for by the Act is '**less than** that afforded by the federal or state constitutions.'" *Cotto*, 51 N.E.3d at 811 (quoting *People v. Pendleton*, 861 N.E.2d 999, 1007 (2006) (internal citation omitted) (emphasis added). The logic of *Cotto* applies to this case in that applying the provisions of Rule 29.15(e) to all postconviction counsel sets forth the minimal level of legal assistance contemplated by Rule 29.15 and the abandonment doctrine.

The State's contends that *Frazier v. State*, 303 S.W.3d 674, 681 (Tenn. 2010) "simply held that the statute authorizing appointment of counsel in postconviction proceedings 'includes the right to conflict-free counsel.'" Resp. Br. 31. Contrary to the State's contention, *Frazier* interpreted Tennessee's postconviction rule as providing "a minimum standard of service to which **post-conviction counsel** is held." (emphasis added). The court stated, "Other jurisdictions have similarly held that a statutory right to post-conviction counsel, while not requiring the level of performance set forth in

Strickland v. Washington, 466 U.S. 668 (1984), does require **a minimum level of assistance**." *Id*. (emphasis added). The court applied the minimal level of assistance to all postconviction counsel, stating in part:

> Appointed and **retained attorneys** in post-conviction cases "shall be required to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel, and diligently investigate and present all reasonable claims."

Id. at 680 (citing Tenn. Sup.Ct. R. 28, § 6(C)(2)).

The State contends that *Steele v. Kehoe*, 747 So.2d 931 (Fla. 1999) is "inapplicable because it dealt with retained counsel's failure to file an initial motion for postconviction relief." Resp. Br. 31. Following the State's logic, the Court's opinion in *Price* would also be inapplicable. Furthermore, the State overlooks the fact that the holding in *Steele* applied "due process" principles to an untimely postconviction motion:

> [D]ue process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a [postconviction] motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner. We hold that, if the prisoner prevails at the hearing, he or she is authorized to belatedly file a [postconviction] motion challenging his or her conviction or sentence.

Steele, 747 So.2d at 934. The court's holding supports Appellant's argument that the State's proposed application of the abandonment doctrine violates the constitutional right of due process. *See* U.S. Const. amends. V and XIV; *see also* Mo. Const. art. I, §§ 10 and 14.

II. IN THE ALTERNATIVE, APPELLANT'S AMENDED MOTION WAS UNTIMELY BECAUSE OF THE EXTRAORDINARY CIRCUMSTANCES CONSTITUTING ACTIVE INTERFERENCE BY A THIRD PARTY.

In this case, Appellant was appointed counsel after he timely filed his initial 29.15 motion accompanied by an affidavit of indigency. (PCR L.F. 1, 9–14). His appointed counsel requested and received an extension of an additional thirty days to file an amended motion. (SLF 2-3). One week before the amended motion was due, Appellant's family retained counsel who entered his appearance in the case and, at the request of appointed counsel, the court entered an order to rescind his appointment. (SLF 8-11). Appellant's retained counsel requested and received an extension of an additional sixty days to file an amended motion. In accordance with the motion court's extension, Appellant's amended motion was timely filed. Twenty-eight days after the motion court granted the extension, this Court issued its opinion in *Stanley v. State*, 420 S.W.3d 532

(Mo. banc 2014), which basically rendered the motion court's ruling a nullity and void *ab initio*.[5]

"Prior to the Court's ruling in *Stanley*, counsel could reasonably rely upon the motion court's exercise of its purported authority to grant additional extensions of time beyond the initial thirty-day extension." *Gittemeier*, at *6 n.3. Because it was reasonable for retained counsel to rely on the motion court's authority, the same is obviously true for Appellant. Notwithstanding Appellant's complete lack of responsibility for the untimely filing, retained counsel's reasonable reliance on the motion court, and the motion court's good faith belief that it had the authority to grant the extension, the State argues that Appellant should suffer the consequences. In the event this Court finds that the abandonment doctrine does not apply to retained counsel, the rare circumstances of this case constitute active interference by a third party.

"Even though the abandonment exception created in *Luleff* and *Sanders* cannot excuse an inmate's failure to file a timely initial motion . . . this Court has recognized other rare circumstances in which such tardiness may be excused." *Price*, 422 S.W.3d at 301. "Specifically, when an inmate prepares the motion and does all he reasonably can do to ensure that it is timely filed . . . any tardiness that results solely from the active interference of a third party beyond the inmate's control may be excused . . . ." *Id.* The

[5] The Court in *Stanley* held that a motion court has no authority to extend the time limit for filing an amended motion for post-conviction relief outside of the time limitations set forth in the applicable Rule. *See Stanley*, 420 S.W.3d at 540-41.

creation of this rule was "motivated by the practical limitations on an inmate's ability to control all of the circumstances that can affect compliance with Rule 29.15 . . . ." *Id.* It is a "practical reality that an inmate cannot comply with Rule 29.15 without relying on a third party to some extent." *Id.* at 302. "Accordingly, where an inmate writes his initial post-conviction motion and takes every step he reasonably can within the limitations of his confinement to see that the motion is filed on time, a motion court may excuse the inmate's tardiness when the active interference of a third party beyond the inmate's control frustrates those efforts and renders the . . . motion untimely." *Id.*

In *Nicholson v. State*, 151 S.W.3d 369 (Mo. banc 2004), this Court excused an inmate's Rule 29.15 motion where the inmate timely filed his motion with the wrong circuit court. The Court stated that "there is no legal or just basis for holding Mr. Nicholson to a higher standard of legal competence than that of experienced attorneys representing clients in other civil matters." *Id.* at 371 n.1. "[T]he Court's decision was motivated by the practical limitations on an inmate's ability to control all of the circumstances that can affect compliance with Rule 29.15 . . . ." *Price*, 422 S.W.3d at 301. In the rare, confusing, and serious circumstances that surround this case, refusing to accept the untimely filing of Appellant creates a rule that holds movants to a higher standard of legal competence than the attorneys they retain. In *Spells v. State*, 213 S.W.3d 700, 701-02 (Mo.App.2007) the court excused an inmate's Rule 29.15 motion where the movant sent it to the court's previous address and the post office received it before the deadline for filing a Rule 29.15 motion. The court found that "Appellant made an honest,

minor clerical mistake in filing his *pro se* motion to the circuit court." *Id*. at 702. Unlike the appellant in *Spells*, Appellant in this case made no mistake at all.

In this case, Appellant's postconviction efforts were frustrated by the third-party interference of the motion court, the prosecutor[6], and this Court's ruling in *Stanley*. But for the sea change that resulted from the opinion in *Stanley*, Appellant's amended motion would have been timely filed. Neither Appellant nor his counsel should be required or expected to predict the future, and the unexpected holding of *Stanley* after the motion court ordered an extension is beyond the control of Appellant and constitutes active interference by a third party.

[6] Despite ample opportunities to raise the issue (e.g., when Appellant requested an extension; when Appellant filed the amended motion; before or after the evidentiary hearing), the State did not seek to raise the late filing of the amended motion as an issue until the Attorney General filed its brief on July 1, 2016, with the Eastern District Court of Appeals.

CONCLUSION

Wherefore, for the foregoing reasons, Appellant requests that this Court reverse and remand the Court of Appeals decision to consider the issues raised by Appellant's amended motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of January, 2017, one true and correct copy of the foregoing brief, was served via the court's electronic filing system on:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c) this brief: 1) contained the information required by Rule 55.03; 2) complies with the limitations in Rule 84.06(b); and 3) contains 4,428 words determined using the word count in Microsoft Word 2016. A copy of this brief was submitted, in PDF format, via electronic copy. All digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

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