IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0196

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MATTHEW WITTAL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Robert B. Allison, Presiding

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1. Should this Court decide Wittal's ineffective assistance of counsel claim on direct appeal based on a silent record?

2. If this Court chooses to address Wittal's claim, has Wittal met his burden of proving both deficient performance and prejudice?

STATEMENT OF THE CASE AND THE FACTS

On June 16, 2016, the State charged Robert Matthew Wittal with deliberate homicide. (D.C. Doc. 2.) Assistant Public Defender from the Major Crimes Unit, Steven Scott, represented Wittal at trial. (8/31/16 Pre-Trial Hr'g Tr. at 3.) A jury found Wittal guilty. (D.C. Doc. 85.) The district court sentenced Wittal to prison for 100 years with an additional 10 years for weapon enhancement. (D.C. Doc. 97.)

This case began the morning of May 26, 2016, when Wittal stabbed Wade Allen Rautio 25 times. Several people witnessed the murder. On that date, Wittal and two other men—David Vincent Toman and Christopher Michael Hansen—took Wade out into the woods east of Creston, near Echo Lake (about 8 miles north of Big Fork). Wittal stabbed Wade because of an alleged drug debt. (Trial Tr. at 296:8-9.) Wittal left Wade's body in a creek for more than two weeks until Toman led law enforcement to the scene. (*Id*. at 260, 274.) Toman told officers he had witnessed the death. (*Id*. at 165.)

In June 2016, Police arrested Wittal, Toman, Hansen, and Melisa Ann Crone, the latter being a drug dealer nicknamed "Red" whom the State alleged had ordered Wittal to kill Wade. (*Id*. at 125, 233:12, 295, 383, 336-37.) All four defendants were using and dealing methamphetamine at the time of the murder. (*Id*. at 135, 147-48, 295.) The State charged Wittal with deliberate homicide and charged Toman, Hansen and Crone with accountability to deliberate homicide. (*Id*. at 183:21, 291:21, 637.)

During Wittal's jury trial in October 2016, witnesses testified that Wittal had bragged about murdering Wade; Wittal wanted to be known as an "enforcer" who could not be messed with. (*Id*. at 363:6, 422:12, 423.) Toman testified that he drove out to Peter's Ridge in the Echo Lake area with three other people, including Wade and Wittal. (*Id*. at 140.) Wittal gave directions where to go. (*Id*. at 141.) Wittal told Wade to get out of the car. (*Id*.) Wittal had a large knife in his hands. (*Id*.) Upon entering a bushy area near a streambank, Toman said Wittal began assaulting Wade. (*Id*. at 143-45.) Wade pleaded for his life. (*Id*. at 145:10.) Toman said Wade exclaimed, "I'm innocent. Please don't kill me." Toman saw Wittal stab Wade in the top of the head. (*Id*. at 145:14-19.)

Hansen testified that before Wittal began his assault, Hansen had the impression they were only going to "rough up" Wade for stealing drugs from Crone, and that Hansen had no part in planning the murder. (*Id*. at 190.) However,

Hansen admitted he had heard Wittal say the night before the murder that Wittal wanted to stab Wade. (*Id*. at 189:7.) Hansen also heard Wittal tell Wade to get out of the car (*id*. at 192:11), and Hansen saw Wittal pull out a "Bowie" knife (*id*. at 193:5) that belonged to Hansen (*id*. at 193:20) and that Wittal must have gotten from the house. (*Id*. at 193-94.)

Hansen saw Wade run from Wittal toward the creek near a bushy area, and then Wade returned to the area near the car. (*Id*. at 194.) Wittal slashed at Wade. (*Id*. at 195:2.) Hansen admitted he intentionally prevented Wade from escaping by striking Wade as he attempted to flee the murder site. (*Id*. at 195:14-15.) Wittal lost the large knife in the creek during the chase and struggle. (*Id*. at 198.) Wittal called out for someone to give him another knife. (*Id*.) Hansen said he then gave Wittal one of his own knives, which authorities later identified as the final murder weapon. (*Id*.) Hansen said he had nothing more to do with the murder other than hiding the knife after Wittal gave it back to him back at the house. (*Id*. at 201.)

The State's exhibits showed Wade's corpse was stashed beneath a log near Echo Lake where authorities later found and identified him. (*Id*. at 278.)

Crone testified that Wittal had told her that he stabbed Wade about 100 times, including once through the skull. (*Id*. at 325:1-2.) A forensic scientist said Wade had been stabbed 25 times, including a fatal cut to the jugular vein and carotid artery. (*Id*. at 534:5, 536:24.)

Wittal took the stand in his own defense. He denied the allegations, said he was not involved in Wade's murder, was not present when Wade was murdered, and asserted Toman, Hansen and Crone had framed him. (*Id*. at 567, 581:9, 584:17-19, "Q. So you weren't there the morning of May 26th? [Wittal]: No, I was not.") At the end of the four-day trial, the jury convicted Wittal of deliberate homicide. (*Id*. at 690:1.)

The district court sentenced Wittal to 110 years in the Montana State Prison. (Sent. Hr'g Tr. at 64.) Wittal will not be eligible for parole for 45 years. The State will discuss other record facts in the arguments that follow.

SUMMARY OF THE ARGUMENT

This Court should not address Wittal's ineffective assistance of counsel claim on direct appeal because the silent record here does not explain "why" defense counsel Steven Scott chose the defense strategy disclosed in the record. Wittal should raise his claim in a postconviction proceeding.

If this Court chooses to address Wittal's claim on direct appeal, Wittal has failed to prove his counsel provided ineffective assistance under the *Strickland* test. Reasonably construing the available record, the State submits that Scott reasoned he did not want to confuse the jury on the inherent unreliability of eyewitnesses since he also depended on the same eyewitnesses to confirm they were present

during the murder and the victim indeed was stabbed to death. Scott wanted the jury to believe that much was true, but as Wittal was not present, Toman and Hansen should only be considered untrustworthy when lying to frame Wittal for murder.

Scott did not, therefore, want the jury believing all of their testimony was unreliable, which is what Instruction 24 would have told the jury. The same conscientious reasoning by Scott supports a similar tactic of avoiding the corroboration instruction. Scott did not want the jury instructed that the State needed to adduce corroborative evidence of Wittal's guilt independent of Toman and Hansen's testimonies, since doing so would necessarily suggest in jurors' minds that Wittal was in fact an accomplice. Wittal has failed to overcome the strong presumption that his counsel's performance falls within the wide range of reasonable professional assistance. Finally, Wittal cannot show *Strickland* prejudice because the instruction would have harmed, not helped, Wittal's chosen theory.

STANDARD OF REVIEW

A defendant's claim of ineffective assistance of counsel constitutes a mixed question of law and fact which this Court reviews de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861

ARGUMENT

Wittal has failed to prove his counsel provided ineffective assistance.

I. Legal standards

In evaluating an ineffective assistance of counsel (IAC) claim, this Court utilizes the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Whitlow*, ¶ 10. Under the first part, the defendant must show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687; *Whitlow*, ¶ 10. Specifically, "'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Whitlow*, ¶ 14 quoting *Strickland*, 466 U.S. at 688.

In order to eliminate the distorting effects of hindsight, judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Whitlow*, ¶ 15. Courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. As the Supreme Court explained, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The

Supreme Court has warned against second-guessing counsel's decisions, considering counsel's intimate and, outside of the record, knowledge of the case:

> Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence."

Harrington v. Richter, 562 U.S. 86, 105 (2011), citing *Strickland*, 466 U.S. at 689.

Under the second part of the *Strickland* test, the defendant must show that counsel's performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *Whitlow*, ¶ 10. A defendant demonstrates prejudice by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

II. Wittal's IAC claim is inappropriate for direct appeal.

Wittal claims his counsel provided ineffective assistance because counsel objected to jury instructions on: (1) the inherent untrustworthiness of accomplice testimony; and (2) the State's burden to adduce corroborating evidence to convict independent of the testimony of those legally accountable for the same offense. (Opening Br. at 24.) Wittal claims his defense theory rested on undermining the credibility of the two eyewitnesses, Toman and Hansen, at the crime scene and of Crone. (*Id*.) Because Wittal maintains his defense theory was to put those

witnesses on trial and argue that they conspired to kill the victim and frame him for the murder, he argues his counsel committed IAC by depriving Wittal "of the full force of the law," resulting in prejudice to his trial. (*Id*. at 45.)

Before addressing an IAC claim on direct appeal, this Court must first determine whether the record is sufficient to determine whether counsel was ineffective. *State v. Robinson*, 2009 MT 170, ¶ 29, 350 Mont. 493, 208 P.3d 851. "Claims involving alleged omissions of trial counsel are often ill-suited for consideration on direct appeal." *State v. Hinshaw*, 2018 MT 49, ¶ 21, 390 Mont. 372, 414 P.3d 271. If the IAC claims are based solely on the direct appeal record, this Court will review them on direct appeal. *Id*. When the direct appeal record "sufficiently answers 'why' counsel did or did not take a certain course of action, the ineffective assistance of counsel claim must be brought on direct appeal." *Id*. On the other hand, IAC claims are appropriate for review in a postconviction proceeding when it is not apparent on the face of the direct appeal record "why" counsel took a particular course of action. *Id*.

This Court should not address Wittal's claim because the silent direct appeal record does not fully reveal whether trial counsel's inaction was a reasonable tactical decision or a mistake. *State v. Vukasin*, 2003 MT 230, ¶ 43, 317 Mont. 204, 75 P.3d 1284. Here, the record shows Stephen Scott revealed that his objection was based upon a reasonable tactical decision. In the hearing settling Proposed Jury

Instruction No. 24, Scott stated his concern was that the jury could get confused on why they might be asked to evaluate whether Toman, Hansen and Crone were legally accountable or not. (10/20/16 In Chambers Hr'g on Prop. J. Instr. 24 at 5.) Scott wanted the three witnesses to be viewed by the jury with distrust but not to the extent the jury might believe those witnesses were on trial. (*Id*.)

The court refined Scott's position by commenting that it could be an acceptable "tactical decision not to offer the instruction, such as the instruction would have been inconsistent with the proffered defense that defendant was not present at the scene of the crime and therefore was not an accomplice." (*Id*. at 6.) As so framed, the court left it to Scott and Wittal to make "a tactical decision . . .whether it's offered or not." (*Id*.) (Quoted phrases resequenced for emphasis.)

Scott again made clear he did not want the instruction offered because it would unduly highlight specific murderous acts. Scott simply wanted the jury to focus on Toman and Hansen as the murderers who framed Wittal, not on the specific acts Toman and Hansen committed, since Wittal was not there. The record shows that after Scott and Wittal had some off-record discussion about the tactic (*id*. at 10-11) Scott then asked in open court if Wittal endorsed Scott's decision not to have Instruction No. 24 offered. Wittal verbally assented. (*Id*. at 8:13-14.)

Wittal focuses strongly on Scott's passing comment to the judge that Scott had not researched the matter. Wittal puts great weight on this comment as if that were proof of deficient performance alone. However, the record does not disclose to what extent Scott relied on his own prior knowledge of the law, what specific issue Scott did not research, or whether his comment was a mere rhetorical stance to indicate to the judge that Scott was not prepared to argue a full legal analysis of his position.

While the State submits that the record before this Court arguably does explain why counsel objected to the instructions, the record does not explain fully whether the choice of strategies was based upon reasonable inquiry and belief. After all, the Court in *Strickland* instructs that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*; *see also Siripongs v. Calderon*, 133 F.3d 732 (9th Cir. 1998) ("the relevant inquiry under Strickland is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable.").

The rule of contemporary assessment demands that an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his choices. *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995). This record does not show what Wittal and Scott discussed off the record at the time they were expressly directed to confirm their decision to choose their tactic. Certainly if the record were developed, and Scott were given the opportunity to explain his justifications for his strategy, particularly the justifications that he and Wittal discussed confidentially, Scott's choice of strategy, if ultimately found reasonable, would not be ineffective assistance of counsel even if he had not performed a complete and thorough legal research into the matter. *Cf. Stankewitz v. Woodford*, 365 F.3d 706, 720 n.7 (9th Cir. 2004) ("An attorney's performance is not deficient where [] . . . it reflects a reasonable strategic choice that aligns with his client's wishes."). But these are arguments that are better served when a fully-developed record is permitted.

The State submits that the record before this Court does not fully or completely explain "why" counsel objected to Instruction No. 24. *Hinshaw*, ¶ 22. The silent record here cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Rovin*, 2009 MT 16, ¶ 34, 349 Mont. 57, 201 P.3d 780. Because the record is mostly silent

on explaining fully why counsel acted in the matter that he did, Wittal's claim should be raised in a postconviction proceeding. *Hinshaw*, ¶ 21; *see also State v. St. Germain*, 2007 MT 28, ¶ 42, 336 Mont. 17, 153 P.3d 591 (stating that defendant's IAC claim is inappropriate for direct appeal, because the record does not explain the reasons for counsel's failure to object). A postconviction proceeding will provide counsel the opportunity to explain his actions or inactions and the necessary record to evaluate whether his decision and performance falls within the wide range of reasonable professional assistance. The proper forum for Wittal's IAC claim is a postconviction proceeding.

Anticipating the State's argument that the IAC is inappropriate for review on direct appeal, Wittal argues his IAC claim is record-based, insisting the record contains all of Scott's reasons for objecting. He emphasizes that Scott gave his reason based on ignorance because Scott said he did not research the matter. Wittal counters with a legal discussion that he was entitled to the jury instruction because even the prosecutors asked that the instruction be given.

Wittal confuses the availability of a legal theory supported by law and the tactical defense decision to avoid the law's application. Application of the accomplice instruction was not a legal entitlement under the facts of this case. Wittal's insistence on his nonparticipation made the instruction optional if not completely discretionary. Accordingly, the charge that Scott failed to research the

law must be evaluated for strategic reasonableness. *Siripongs*, 133 F.3d at 734. Where the attorney consciously decided not to conduct further research because of reasonable tactical evaluations about the jury's perceptions about Wittal's claim of non-participation, the attorney's performance was not constitutionally deficient. *Id*. While the record strongly points to the careful and conscientious selection by Scott of an all or nothing tactic, a more developed record is necessary to examine his justifications.

III. If this Court chooses to address the merits of Wittal's claim, Wittal has failed to demonstrate that his counsel provided ineffective assistance.

A. Wittal has not demonstrated his counsel's performance was deficient.

Wittal's counsel's performance was not deficient for objecting to Instruction No. 24 because, as previously explained, not objecting meant the instruction would have been given, and it would have run the risk of having the jury confused about Wittal's defense theory that he did not participate in the murder.

Wittal errs in suggesting his defense depended on undermining the witnesses' credibility. This implies Wittal would want all their credibility distrusted. Rather, Wittal's defense depended upon undermining their credibility only when pointing to Wittal as the murderer, not themselves. Scott wanted the jury to believe the witnesses to the extent they implicated themselves as

conspirators who committed the murder to frame Wittal. Inconsistent with this double-edged approach was Instruction 24 which would have led the jury down a path of assessing Wittal as an accomplice.

A decision to not present inconsistent theories is not ineffective. *Jackson v. Shanks*, 143 F.3d 1313, 1320 (10th Cir. 1998). And while an attorney is entitled to present inconsistent arguments in a criminal case, that entitlement does not imply an obligation. *Wilson v. United States*, 414 F.3d 829 (7th Cir. 2005); *see also Middleton v. Roper*, 455 F.3d 838, 848-49 (8th Cir. 2006) (avoiding inconsistency with defendant's claim of innocence was sound strategy).

If the court had given Instruction No. 24, Scott would have been forced to clarify, in contradiction to the instructions, that the jury should hold Toman and Hansen trustworthy to the extent they credibly described participating in the murder. Scott would have been subject to the jury's judgment that he was talking out of both sides of his mouth. Also, defense counsel's performance was not deficient for not insisting that the State corroborate Wittal's guilt independent of Toman's and Hansen's testimony.

Avoiding an instruction that would undercut a client's nonparticipation claim, under federal constitutional law, is a reasonable tactic. *See Casale v. Fair*, 833 F.2d 386, 392 (1st Cir. 1987) (stating it is not ineffectiveness to fail to request an instruction which would undercut the

defense theory of nonparticipation). Moreover, the instruction would have debased the important contrast between the competing theories of the State and the defense. Either Wittal was not there and Toman and Hansen murdered Wade because Toman and Hansen credibly implicated themselves, or Toman and Hansen were entirely credible, in which case the jury was free to convict Wittal of murder. Wittal endorsed Scott's strategy of pursuing an all or nothing defense.

Scott operated on his own sense of how the jury would perceive Wittal's claim of non-participation; Scott chose the tactic of not painting Toman and Hansen as *wholly* unbelievable. His sense of how a jury would react to an instruction that could lead the jury to reject outright Toman's and Hansen's credibility warrants *Strickland* deference. *See Spaziano v. Singletary*, 36 F.3d 1028, 1040 (11th Cir. 1994) (Court should defer to an attorney's sense of how a jury would react as a basis upon which the attorney decides to reject an alternative theory).

Scott's decision to object to the instruction "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Wittal has failed to overcome that presumption. Wittal has not demonstrated his counsel's performance was deficient.

B. Wittal has not demonstrated prejudice from his counsel's alleged deficient performance.

There is no reasonable probability that, but for the jury not hearing Instruction No. 24, the outcome of this case would have been different. Pursuing the accomplice instructions could have worked, according to Wittal, to give him the "full force of the law." (Opening Br. at 45.) Wittal is not helping his cause by resorting to post hoc appeals for broader applications of the law. *Strickland* recites that there are countless ways to provide effective assistance in any given case that and even the best criminal defense attorneys would not defend a particular client in the same way. *Strickland*, 466 U.S. at 689.

Wittal discusses the corroboration statute and argues that it applies regardless of any defense theory because the jury must be given independent corroborating evidence for the jury to rely on the accomplice or codefendant's testimony. (Opening Br. at 29.) In support of this argument, he invites this Court to review its precedent holding that reversible error occurs when such instructions are not given. (*Id*.) But nowhere in his opening brief does Wittal assert the court presiding over his case committed reversible error in not giving the instruction.

To the extent Wittal suggests the trial court should have given the distrust instruction because he was entitled to it, Wittal in this appeal neither raises a discrete claim for appellate relief nor briefs his implied assertions that the court's failure to give the instruction violated statutory or constitutional law. These points

demonstrate Wittal is simply asserting that in hindsight his counsel should have taken advantage of the instruction.

Wittal errs in hinting Scott had "nothing to lose" in asking for the instruction. (Opening Br. at 38.) Such an implied assertion is tantamount to the oft-expressed IAC assertion that "no conceivable rationale" existed for an attorney to have taken certain actions. A "no legitimate reason" or "no conceivable rationale" is a throwaway phrase used to draw attention away from the fact it is Wittal's burden as an IAC claimant to show that the action undertaken by counsel was not warranted. *See Knowles v. Mirzayance*, 556 U.S. 111, 119 (2009) (pointedly rejecting the claim that counsel is ineffective simply because he or she did not take an action when "there was nothing to lose by pursuing it."); *Rice v. Hall*, 564 F.3d 523, 526 (1st Cir. 2009) (prejudice allegations were deficient where they rested almost entirely on "mays" and "could haves"); *Hunt v. Houston*, 563 F.3d 695, 705 (8th Cir. 2009) (unsupported speculation about the possible existence of some as yet undiscovered malfeasance does not establish prejudice).

An attorney's conduct is not deficient simply because another attorney would have conducted a defense differently. *United States v. Chambers*, 918 F.2d 1455, 1462 (9th Cir. 1990). Further, speculation that a different lawyer, or the same lawyer using a different strategy or tactics, would have changed the result is insufficient to show prejudice. *Cooks v. Spalding*, 660 F.2d 738,

740 (9th Cir. 1981). It is inappropriate to focus on what could have been done by counsel rather than focusing on the reasonableness of what counsel did. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998).

Scott was faced with testimony from Wittal stating that Crone wanted Wade dead because of his thefts and to preserve her drug operation. (Trial Tr. at 568.) Wittal said he warned Wade to leave town because he was in danger. (*Id*. at 567:24-25.) while Wittal asserted he had tried to save Wade from Toman and Hansen, Wittal also admitted he believed Wade had tried to steal from him. (*Id*. at 567.) While Wittal said Wade returned Wittal's items to him (*id*. at 567:12), the affirmation by Wittal that Crone wanted Wade dead because of his thefts led the jury to see that Crone and Wittal shared a common motive to murder, thus making it more likely that the jury would see him as an accomplice.

Scott did not want the distrust and corroboration instructions because they would open the door to further jury scrutiny of Wittal as an accomplice, having his credibility undermined by the same instruction. Under Wittal's chosen defense theory, Toman and Hansen were accomplices to each other, not accomplices with Wittal. Under these circumstances, Scott acted wisely to object to the instruction, which, if given, would have diminished Wittal's theory and prejudiced him far more than had it not been given at all.

Further, during the State's cross-examination of Wittal, the prosecutor confronted Wittal with a confiscated jailhouse letter to his fiancée outlining the story he was telling his attorney. (*Id*. at 590.) In the letter, Wittal said if she followed his directions, "I'll give you the world the second I get out." (*Id*. at 590:20-21.) Christina O'Lexey, Wittal's girlfriend at the time of the killing (*id.* at 360), testified that before the murder she heard Wittal yell to Wade, "You better not let me catch you outside the house, you're fucking dead." (*Id*. at 365:1-2.) After the time of the murder, O'Lexey witnessed Wittal come back to the house with Hansen and Toman. (*Id*. at 372.) She saw that only Wittal was soaked with water up to his waist. (*Id*. at 372:8-13.) These were sufficient independent corroborating facts that circumstantially supported Wittal's guilt and complicity with the others. A distrust and corroboration instruction would have unduly highlighted this and, therefore, harmed, not helped, Wittal's chances of separating himself from having any role in the murders. Wittal has failed to show prejudice under *Strickland*.

CONCLUSION

Wittal's IAC claim is inappropriate for direct appeal and should be raised in a postconviction proceeding. If this Court chooses to address the merits of Wittal's claim, Wittal has failed to show his counsel provided ineffective assistance.

Respectfully submitted this 1st day of May, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,876 words, excluding certificate of service and certificate of compliance.

/s/ C. Mark Fowler
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CERTIFICATE OF SERVICE

I, C. Mark Fowler, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-01-2019:

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