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STATE OF MONTANA
Case Number: DA 17-0454

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0454

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES GEOFFREY SANTORO,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Ninth Judicial District Court,
Toole County, the Honorable James A. Haynes, Presiding

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I. Because deficient assistance destroyed Geoff's justifiable-use-of-force defense, the Court should remand for a new negligent homicide trial.

Let's start with what cannot be reasonably disputed. Trooper Garza conducted the crash-scene investigation in the gravel parking lot outside the Vets' Bar. (D.C. Doc. 203, Ex. CC ("Garza Report") at 72, 77; Trial at 630.) Trooper Garza measured, marked, and mapped the scene's physical features—tire tracks, drag marks, Levi's body, gravel piles, other items. (Garza Report at 77–78.) "[T]otal station," he called it. (D.C. Doc. 108, Ex. W ("Garza Interview") at 9.) Trooper Garza interviewed witnesses—some of them, like Tiffany, multiple times. (Garza Report at 77–78.) Trooper Garza filed a report documenting his investigation and stating his conclusions. (Garza Report at 72–81.) Trooper Garza's conclusion? Levi was run over once, when Geoff reversed. Geoff then drove the car away without further contact. (Garza Report at 80; Garza Interview at 9.) Trooper Garza's computer-generated, to-scale scene map tells the tale. (Appellant's Br. at 3 (exhibiting the map); Garza Report at 81.) "That's what the evidence at the scene told us." (Garza Interview at 9.)

The State nonetheless argued, both pretrial and at trial, that Levi was run over twice, the second time as Geoff drove forward and Levi was already on the ground. (D.C. Doc. 107 at 6–7, 12; Trial at 799–805.) In closing argument, the State attacked the notion Levi could have been run over just in reverse as "a fantasy." (Trial at 800.) Notwithstanding the State's present protestations of irrelevance, the State explained to the jury the significance of its theory that Levi was run over twice: While Geoff had a bona fide justifiable use of force defense for driving in reverse, the defense did not reasonably apply to driving forward. "Whatever excuse he's given for going backward," the prosecutor explained, "he's got no reasonable or rational explanation for why he went forward." (Trial at 805.)

The jury that convicted Geoff of negligent homicide never learned of Trooper Garza's conclusion, which contradicted the State's theory. (*See* Trial at 543–672.) Defense counsel offered just argument, not evidence, that Levi was run over only in reverse. (Trial at 774–75, 782, 786.) Why was Trooper Garza's essential, exculpatory testimony not presented to the jury? Because defense counsel failed to serve Trooper

Garza with a subpoena and did not seek a continuance if needed to ensure Trooper Garza's presence. (Trial at 633–34, 638–46.)

The foregoing is the core of Geoff's ineffective assistance of counsel claim. The constitutions and justice demand a new negligent homicide trial with the effective assistance of counsel.

A. The record establishes defense counsel unreasonably failed to secure a crucial witness through a served subpoena.

The State asks this Court to punt the ineffective assistance of counsel claim to post-conviction proceedings. (Appellee's Br. at 18, 22–24.) Nothing would be gained. The existing record establishes both what Trooper Garza's testimony would have offered the defense (*see* Garza Report, Garza Interview) and why Trooper Garza was absent from trial (*see* Trial at 633–34, 638–46). Defense counsel's culpability for Trooper Garza's crucial absence forms the ineffective assistance of counsel claim. (Appellant's Br. at 20–21.) Post-conviction proceedings would not alter the analysis.

All the State can conceive that might rest outside the record are dates showing when specific things did or didn't happen. (Appellee's Br. at 23.) But the key question in a record-based ineffective assistance of

counsel claim is not when but why. *State v. Kougl*, 2004 MT 243, ¶ 14, 323 Mont. 6, 97 P.3d 1095. Applied here, the question is why counsel did not present the Garza evidence.

Insofar as dates are significant to answering that question, the record on appeal contains them. Trial was scheduled for August 8–12. (D.C. Doc. 154.) On June 6, the State got its subpoenas for trial and did not get a subpoena for Trooper Garza. (D.C. Doc. 155.) On July 28, defense counsel got its subpoenas and got a subpoena for Trooper Garza. (D.C. Doc. 179.) Upon attempting to serve Trooper Garza with that subpoena before trial, defense counsel learned Trooper Garza had relocated to Washington. (Trial at 642.) Defense counsel did not at any time pursue an out-of-state subpoena. (Trial at 639–40.) Defense counsel did not move to continue the trial to make sure Trooper Garza would be there. (Trial at 645–46.) Defense counsel did not establish contact with Trooper Garza until August 9—the second day of trial, after the State had rested. Defense counsel could only then request and not compel Trooper Garza to show up for trial the next day, hundreds of miles away. (Trial at 642–43.) The record establishes all this and more. No additional dates are necessary.

State v. Weber, 2016 MT 138, 383 Mont. 506, 373 P.3d 26, is another direct-review case in which a meritorious ineffective assistance of counsel claim did not have to wait for post-conviction proceedings. (Appellant's Br. at 31–32.) In *Weber*, this Court addressed facts establishing that defense counsel's failure to get evidence admitted was not a strategic or reasonable decision. *Weber*, ¶ 27. The evidence was admissible, the evidence was material to the defense's strategy, counsel attempted to get the evidence admitted, but counsel failed to get the evidence admitted because he obviously did not do the necessary groundwork (i.e., investigating the case, laying a foundation). *Weber*, ¶¶ 24–27. Accordingly, this Court exercised direct review to deem counsel's failure unreasonable. *Weber*, ¶¶ 27–28.

Despite the State's resistance (Appellee's Br. at 23–24), this case is the same where it counts. Trooper Garza's work and conclusions were clearly admissible through Trooper Garza's testimony. The evidence was key to the defense's argued strategy of showing Levi was run over only in reverse, when Geoff's justifiable-use-of-force defense would operate. (*See* Trial at 774–75, 782, 786.) Defense counsel tried to get the evidence admitted through having an in-state subpoena issued

for Trooper Garza and attempting to introduce Trooper Garza's report as hearsay. (D.C. Doc. 179; Trial at 633.) But defense counsel failed to get the evidence admitted because he hadn't done the necessary groundwork—specifically, serving an effective subpoena. (Trial at 633–34, 638–46.) As in *Weber*, because the record reveals the reason for the failure (not serving a subpoena, not getting a continuance if necessary) and discounts any plausible justification, direct review is appropriate to deem defense counsel's failure as what it was—unreasonable performance.

The State tries to distinguish *Weber* through defense counsel's statement that he "suspected" the State "might" get Trooper Garza to trial. (Appellee's Br. at 22.) From that, the State argues defense counsel "had no reason to know Trooper Garza was not going to appear at the trial and, thus, had no basis to secure a material witness subpoena." (Appellee's Br. at 23.) The State's claims do not withstand scrutiny and do not justify defense counsel's performance.

As this Court well knows, crucial witnesses do not appear at a homicide trial by happenstance, they appear through a served

subpoena.[1] Defense counsel knew it too. Why else did he seek compulsory subpoenas for defense witnesses? (D.C. Doc. 179.)

But unlike most of the defense witnesses who were also subpoenaed by the State (*compare* D.C. Doc. 155 (State subpoenas) *with* D.C. Doc. 179 (defense subpoenas)), defense counsel had substantial reason to know Trooper Garza was not going to appear without the defense serving an effective subpoena. Defense counsel had notice of the State's subpoenas and that the State did not subpoena Trooper Garza. (D.C. Doc 155.) Defense counsel had notice the State had not sought an out-of-state subpoena because the State had not petitioned for such a subpoena. *See* Mont. Code Ann. § 46-15-113(1) (requiring petitioning a Montana court for a certificate to present to the out-of-state court for a material, out-of-state witness). Defense counsel had notice Trooper Garza's conclusion contradicted the State's theory of the case because the State had already asserted its false theory in pretrial briefing. (D.C. Doc. 107 at 6–7, 12.) Under the circumstances, if

[1] The State entered evidence on this point. (Trial at 633–34 ("[State]: How did you get into court today? Were you under a subpoena? You were under a subpoena; isn't that correct? [Witness]: Yes, ma'am. [State]: And that's how witnesses come into court, is under a subpoena, isn't it? [Witness]: Yes, ma'am.").)

defense counsel believed Trooper Garza would manifest himself at the trial without defense compulsion, it was ab entirely unreasonable belief, not a reasonable justification for defense inaction. Effective assistance would not risk the admission of such crucial evidence on such wishful thinking.

The State does not counter that, generally, "a defense attorney's failure to present a material[,] exculpatory witness of which he is aware qualifies as deficient performance." (Appellant's Br. at 23 (quoting *Jones v. Calloway*, 842 F.3d 454, 464 (7th Cir. 2016)).) The proposition applies here. The record shows defense counsel failed to secure a material, exculpatory witness. The failure was due to defense counsel failing to serve an effective subpoena. The failure was neither strategic nor reasonable. No plausible justification could exist that would comport with what we already know: Through deficiently failing to serve an effective subpoena, defense counsel crippled an effective defense for the accused.

B. Because Trooper Garza's testimony was necessary to make the accused's self-defense claim a meaningful defense, trial counsel's deficiency tainted the trial's fairness. There is a reasonable probability the trial would have ended differently with effective assistance.

The prejudice-prong question is whether, but-for counsel's deficient performance, there is a reasonable probability the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Assessing the probability demands placing the deficiency in context. *Strickland*, 466 U.S. at 695–96. That's what Geoff's opening brief aims to do, comparing the Garza evidence to the charges and defenses, the evidence admitted, and the theories and arguments of counsel. (Appellant's Br. at 34–36.) The appropriate analysis leads to a conclusion: But-for the absence of Trooper Garza's testimony, there is a reasonable probability the jury would have determined Levi was run over just in reverse, and that the State could not establish beyond a reasonable doubt that Levi strangling Geoff to the brink of unconsciousness did not justify Geoff driving in reverse. The State's

brief demonstrates the lack of sound arguments for rejecting this conclusion.

The State's primary response is that in the process of finding Geoff guilty of negligent homicide without hearing Trooper Garza's testimony, the jury nonetheless necessarily determined Geoff's initial conduct of driving backward was unjustified. (Appellee's Br. at 29, 31, 32, 33.) The claim does not hold up.

In fact, the claim is squarely contradicted by the State's arguments to the jury, which the State avoids acknowledging on appeal. The State on appeal asserts "[o]nce Santoro asserted JUOF, the jury's focus turned to whether Santoro was justified in accelerating in reverse; not, as Santoro argues on appeal, how many times he ran over Levi." (Appellee's Br. at 19.) But here was the State's argument to the jury: "Whatever excuse he's given for going backward, he's got no reasonable or rational explanation for why he went forward." (Trial at 805.) The idea Levi was run over only in reverse was "not true" and "a fantasy." (Trial at 799, 800.) The State on appeal cannot answer why, if Levi being run over only in reverse was "a fantasy," and "[w]hatever excuse" Geoff gave for reversing, he had "no reasonable or rational explanation

for why he went forward," the jury would need to determine whether Geoff was justified in reversing when it could decide the case by Geoff supposedly committing the crimes by driving forward. The State's argument requires presuming the jury engaged in idle deliberations. Such a presumption is neither required nor reasonable. *See* Mont. Code. Ann. § 1-3-223 ("The law neither does nor requires idle acts.").

In the same vein, the State attempts to capitalize on Geoff reasonably choosing not to appeal his criminal endangerment convictions. The State contends the criminal endangerment convictions mean the jury found Geoff unjustified in reversing his vehicle as to the negligent homicide charge. (Appellee's Br. at 26–28.) But these were different offenses with different facts.

First, a jury focusing exclusively on Geoff's conduct of reversing could plausibly determine the conduct was justified as to Levi (the aggressor) but that the justification did not extend to Justin and Tiffany. *See State v. Mitchell*, 2017 MT 215, ¶ 5, 14, 388 Mont. 415, 404 P.3d 388 (concluding the jury accepted a justifiable-use-of-force defense toward one alleged victim but rejected it as to another).

Second, although the State's argument assumes the jury determined the criminal endangerment convictions based on Geoff's conduct of reversing, the State at trial argued Geoff committed criminal endangerment, like negligent homicide, by driving forward. (Trial at 802.) The jury agreeing with the State on that argument was not a determination Geoff's initial conduct of reversing was not justified.

Third, the missing Garza evidence was evidence severing causation between Geoff driving forward and Levi's death for negligent homicide, Mont. Code Ann. § 45-5-104(1); it was not evidence severing causation between Geoff driving forward and the *risk* of harm to Tiffany and Justin for criminal endangerment, Mont. Code Ann. § 45-5-207(1). Had the Garza evidence been offered, it would have reasonably prompted the jury to determine Geoff's justification for reversing as to negligent homicide but not necessarily criminal endangerment.

Add these points up and the takeaway is clear: The criminal endangerment convictions say nothing about the failure to secure Trooper Garza's testimony and its established prejudicial effect on the negligent homicide trial.

The State's secondary prejudice argument is that, even if defense counsel had secured Trooper Garza's testimony, the trial would still have ended with a homicide conviction. The State appears to find significant that a jury *could* convict Geoff for his conduct of reversing his vehicle. (*See* Appellee's Br. at 32.) But whether Geoff *could* be convicted with Trooper Garza testifying that Levi was run over just in reverse is not the issue. Addressing whether sufficient evidence exists to convict "has nothing to do with *Strickland*." *Crace v. Herzog*, 798 F.3d 840, 849 (2015). *Strickland* even disclaims that it be more likely than not that the trial would have ended differently in order to establish prejudice. *Strickland*, 466 U.S. at 693. *Strickland*'s reasonable probability standard merely requires that confidence in the verdict be undermined. *Strickland*, 466 U.S. at 694.

Applied here, it can hardly be disputed that if the jury had heard Trooper Garza's conclusion, there is more than a reasonable probability the jury would have rejected the State's theory that Geoff committed negligent homicide by running Levi over in drive. And, if that occurred, it can hardly be disputed that the State's remaining path to a conviction—proving beyond a reasonable doubt that Geoff was not

justified in reversing when Levi was choking him[2]—was reasonably likely to lead to an acquittal or a hung jury. That establishes a reasonable probability of a different result. It also establishes that defense counsel's deficient performance compromised the fundamental fairness of Geoff's trial. *See Strickland*, 466 U.S. at 670 (stating "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding").

The State asserts that if "the trooper testified about his report, it was more than likely that he could not state with certainty that Santoro ran over Levi once, as he backed up." (Appellee's Br. at 33.) But the record consistently refutes the State's arguments for why Trooper Garza would supposedly contradict his report on the stand:

- The State says the District Court "recognized" the State's cross would diminish the strength of the Trooper Garza's testimony.

[2] Geoff reasserts his opening brief's statements of facts, particularly that there was no direct rebuttal to Geoff and Porter's testimony that Levi was grabbing and choking Geoff's neck. (Appellant's Br. at 14.) Contrary to the State's assertion (Appellee's Br. at 5–6), Justin did not testify Levi did not choke Geoff; he testified he didn't see it, and admitted he was positioned such that he wouldn't have seen it. (Trial at 357–58, 371 (Q: "You couldn't see what Levi was doing with his hands because you were behind him; right?" A: "Right.").)

(Appellee's Br. at 33.) The trial court never recognized anything so speculative. The trial court noted that, rather than admit Trooper Garza's report as hearsay, it was appropriate for the State to have the opportunity to cross-examine Trooper Garza, which it was. (Trial at 642.)

- The State says Trooper Garza "apparently was made aware" Billy Jean Scarbrough saw Geoff's truck buck up while driving forward. (Appellee's Br. at 33.) Trooper Garza was, in fact, the person who interviewed Scarbrough when she said that. (Garza Report at 78.) Trooper Garza did not conclude the lurching truck meant it ran over Levi going forward.[3] (Garza Report at 80.)
- The State says "three additional witnesses" testified they saw Geoff drive forward over Levi. (Appellee's Br. at 33.) In fact, only two witnesses testified to that. (Appellant's Br. at 15–16.) One subsequently admitted that, despite her claim at trial, she previously told law enforcement all she saw was Geoff driving away and Tiffany and Justin rolling on the ground. (Trial at 319–20.) The other

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[3] A gravel mound accounts for the truck bucking up. (*See* Appellant's Br. at 15, 26.)

witness was Tiffany. Her claim that she saw Levi get run over in drive is in the record for the first time at trial. No record exists of her saying that to Trooper Garza in their interviews occurring for the official investigation. (Garza Report at 77–78.)

- The State references confronting Trooper Garza with "the extensive injuries the medical examiner noted on Levi." (Appellee's Br. at 33.) The medical examiner himself testified the injuries did not tell him whether Levi was run over once or twice. (Trial at 514, 516.)
- The State diminishes Geoff's argument as based "only on the report and the trooper's responses to the defense's leading questions during a pretrial interview." (Appellee's Br. at 33.) The report is, in fact, eight pages long, clearly written, includes a diagram, and offers the official conclusions of a trained Montana highway patrol trooper investigating a traffic fatality. (Garza Report.) In Trooper Garza's interview, he stood by his report without being coaxed. (Garza Interview at 9.)
- The State says "Trooper Garza likely would have agreed it was possible" Geoff ran over Levi driving forward. (Appellee's Br. at 34.) Experts don't often speak in certainties but nonetheless derive

conclusions. Trooper Garza's affirmative, considered conclusion was that Levi was run over only in reverse. (Garza Report at 80.) "That's what the evidence at the scene told us." (Garza Interview at 9.)

In sum, defense counsel's failure to secure Trooper Garza's testimony resulted in a skewed evidentiary picture that encouraged the jury to convict without considering Geoff's bona fide justifiable-use-of-force defense to driving in reverse. This Court's confidence in the negligent homicide verdict should be undermined by defense counsel's deficiency. With direct review firmly establishing both prongs of ineffective assistance of counsel, the Court should remand for a new negligent homicide trial.

II. The District Court exceeded its authority and illegally ordered restitution unrecoverable in a civil action by not offsetting prior payments made through Geoff's insurance.

Criminal restitution cannot legally exceed special damages recoverable in a civil action. Mont. Code Ann. §§ 46-18-243(1)(a), -244(2). The State claims it is "undisputed" the District Court's restitution order comprised only special damages recoverable in a civil action. (Appellee's Br. at 38.) Geoff disagrees. That is the dispute's essence. As repeatedly argued by Geoff both below and on

appeal, the District Court's restitution order illegally exceeds special damages recoverable in a civil action by failing to offset prior payments made through Geoff's insurance. (Sentencing at 23–24; Appellant's Br. at 21–22, 39, 42.)

While the State insists the restitution order was legal, the State fails to recognize the fundamental distinction between payments made through a tortfeasor's insurance, on one hand, and an injured party's insurance, on the other. As presented in the opening brief, sister courts recognize this distinction in criminal restitution matters. (Appellant's Br. at 40–41.) As argued below and on appeal, the distinction means *State v. Fenner*, 2014 MT 131, 375 Mont. 131, 325 P.3d 691, does not legitimize the District Court's restitution order. (Sentencing at 23–24.)

Rather than grapple with the distinction, the State extracts a single line from *Fenner* in which the Court noted there is no statutory provision that specifically requires offsetting a prior payment to the victim from an insurer with a subrogation right. *Fenner*, ¶ 14 (citing § 46-18-243(2)(a)(iv)). Geoff does not claim such a provision exists. There is, however, a provision at the center of the restitution statutes requiring restitution not exceed what would be recoverable in a civil

action. *See* § 46-18-243(1)(a). Because, here, the prior payments were from the defendant's insurer, and not the victim's insurer as in *Fenner*, that provision is violated by the failure to offset the prior payments in the restitution order.

The State appears to raise whether Geoff's insurer might have a subrogation right to Geoff's restitution payments to the injured parties. (*See* Appellee's Br. at 39.) No such right could exist because such a subrogation right would effectively render Geoff's insurance illusory. Undersigned counsel does, however, wish to clarify and withdraw the opening brief's citation to Mont. Code Ann. § 27-1-308(1), the statute providing that a collateral source without a subrogation right's payment to the plaintiff must be offset in certain situations. A collateral source must be "wholly independent of and collateral to the wrongdoer." *Five U's, Inc. v. Burger King Corp.*, 1998 MT 216, ¶ 16, 290 Mont. 452, 962 P.2d 1218. Because the payments here were from Geoff's insurer, they were the opposite of wholly independent and collateral to him.

That the payments were made on Geoff's behalf by his insurer, however, means they must be offset. In *Fenner*, the injured party's insurer was a collateral source. *See Fenner*, ¶12. Payments through

that insurance thus fell under the collateral source rule.[4] The collateral source rule says a payment from a collateral source to an injured party "will not diminish the damages otherwise recoverable from the wrongdoer." *Five U's*, ¶ 16. The "position of the law" is that such a payment "to the injured party should not be shifted so as to become a windfall for the tortfeasor." *Five U's*, ¶ 15 (citing Restatement (Second) of Torts ("Restatement") § 920A cmt. b (1979)). If, as in *Fenner*, the injured party "was himself responsible for the benefit, as by maintaining his own insurance . . . , the law allows him to keep [the prior payment] for himself." Restatement § 920A cmt. b.

But the collateral source rule does not apply to a source that is not collateral to the tortfeasor. *Five U's*, ¶ 16. Rather, "[a] payment made by a tortfeasor *or a person acting for him* to a person whom he has injured *is* credited against his tort liability . . . ." Restatement § 920A (emphasis supplied). "If a tort defendant makes a payment toward his tort liability, it of course has the effect of reducing that liability. *This is also true of payments made under an insurance policy that is*

[4] Not to be confused with the exception to the collateral source rule found at § 27-1-308(1).

maintained by the defendant, whether made under a liability provision or without regard to liability, as under a medical-payments clause." Restatement § 920A cmt. a (emphasis supplied). As argued in the opening brief (Appellant's Br. at 41–42), because the prior payments here were indisputably made under an insurance policy maintained by Geoff, they reduced Geoff's liability, whether in a civil action or criminal restitution. *See* Mont. R. Civ. P. 8(c)(2) (stating prior payments are a defense); Mont. Code Ann. § 26-1-706 (stating prior payments are credited); *Locke v. Estate of Davis*, 2015 MT 141, ¶ 26, 379 Mont. 256, 350 P.3d 33 (holding a trial court abused its discretion by refusing to reduce the defendant's liability by advance payments made through the defendant's insurance).

Regarding the remedy, the State says it is not clear from the record whether the $25,000 payment to Tiffany flowed through the criminal endangerment conviction or the negligent homicide conviction. (Appellee's Br. at 36.) In any event, the District Court's restitution order comprises over $25,000 in separate damages to Tiffany and Levi. (*See* Judgment at 2, 5.) The District Court's failure to offset the insurance payment as to either was illegal as to at least one of them.

But depending on this Court's resolution of the ineffective assistance of counsel claim, the possible ambiguity[5] may affect the remedy. Should the Court reverse the negligent homicide conviction, the restitution based on that conviction would fall. *See* § 46-18-243(2)(a). In that event, Geoff does not object to a hearing on whether his insurer's payment to Tiffany was for harm to Levi (in which case the restitution order would not require further reduction after already being reduced due to the conviction's reversal) or for harm to Tiffany (in which case the restitution order would need to be offset by the prior payment).

CONCLUSION

For the foregoing reasons, Geoff requests the Court remand for a new negligent homicide trial and remand for the District Court to offset the restitution order by Geoff's insurer's prior payments.

[5] Geoff reads the record as suggesting the payments were related to the truck hitting Tiffany, not Levi. (*See* Sentencing at 25 (Tiffany testifying "They paid me. He held a max of 25,000 per person, so they paid me 25,000.").)

Respectfully submitted this 18th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook 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 4,346, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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