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Case Number 368,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAVAGHN WAPLES,	)	
	)	
Defendant Below-Appellant,	)	**No. 368, 2021**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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DATE: March 3, 2022

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, that State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Javaghn Waples' February 1, 2022 Opening Brief. This is the State's Answering Brief in opposition to Waples' direct appeal of his Sussex County Superior Court jury conviction for possession of a firearm by a person prohibited (PFBPP).

SUMMARY OF ARGUMENT

I. DENIED. To the extent the defense presented a *Batson* challenge at the January 2020 Superior Court jury trial of Javaghn Waples (A-60), the prosecutor presented a race-neutral explanation for the State's use of a peremptory jury challenge to remove a minority potential juror. There was no pattern of racial discrimination present in the single challenged jury strike. The potential juror's misdemeanor criminal record was a valid race-neutral basis for the State's exercise of a peremptory jury challenge. Waples has demonstrated no violation of the fair cross-section requirement of 10 *Del. C.* § 4501, or the equal protection of law guarantee of the Fourteenth Amendment to the United States Constitution. (A-59-60). A trial judge's factual findings are upheld on appeal unless clearly erroneous.

STATEMENT OF FACTS

On December 25, 2018, Shameka Johnson ("Johnson") was living at 19881 Pine Street, Lincoln, Delaware with Javaghn Waples, who had moved in with her in March 2018. (B-1, 3, 29). Johnson knew Waples since 1999, and although the couple never married, they had two daughters (S. W. and Y. W.), ages 13 and 16. (A-72-73). That Christmas morning six people were staying in Johnson's Sussex County home: Johnson, Waples, the couple's two minor female children, Johnson's son Tyshawn Johnson, and Tyshawn's pregnant girlfriend Abrianna Hernandez. (A-73; B-11-12). Johnson was planning to go to her sister's home later that day for Christmas. (A-78).

Waples had been at the Lincoln home 6-7 hours on December 25. (A-74). Waples and Johnson were drinking alcohol, smoking marijuana, and arguing. (A-68, 74). According to Johnson, her relationship with Waples was ending (A-68), and she told him that after the children had their Christmas celebration, he should leave the house. (A-68-69). Johnson had been preparing food and wrapping gifts for her children (A-67), but she went to her bedroom at about 7 A.M. to rest before her children got up on Christmas. (A-78; B-9-10).

Waples followed Johnson into the bedroom, but he said he was not going to go to bed and sleep. (A-69). Waples added that "Somebody is going to meet Jesus . . . ." (A-69). Waples also removed his gun, a .357 Magnum revolver (B-48-49),

from a bedroom nightstand and held it in his hand. (A-69). At trial, Johnson testified that Waples had the gun for a few years (B-9), and "Javaghn always has a gun with him. It's in the drawer or on him." (A-75). Johnson added about Waples' gun, "If it's not in the house, if it's in a car, it's underneath the seat. It's somewhere where he can reach it." (A-75).

Prior to trial testimony, the defense stipulated that Waples was a person prohibited from possessing a firearm. (A-64-65).

At trial Johnson told the jury:

> When I got down to the foot of the bed, something gave me a cold chill and I got out of bed to turn the light on to get something out of my closet. You know, when I was grabbing for something, all I know is I turned around and I seen the smoke from the gun and then, you know, I heard, my ear was ringng. I was like, he shot me.

(A-69).

Waples fired the one gunshot (B-6) at about 7 A.M. on Christmas morning. (A-78). Johnson felt a burning sensation. (A-71). When the gunshot occurred the bedroom light was on. (A-77). During defense cross-examination at trial, Johnson repeated, "As I turned around, I see smoke from the gun and I felt myself burning." (A-77). She elaborated: ". . . I knew he had the gun on him when I moved from the top of the bed to the bottom of the bed." (A-77). Johnson told the jury, "[The gun] was in the desk drawer. Javaghn got it out of the desk drawer and put it on

him." (A-78). At trial Johnson identified Waples as the person who shot her. (B-2).

Tyshawn Johnson, Shameka Johnson's son (A-73), was awakened on December 25, 2018, by his girlfriend who reported that she heard screams. (B-12). Tyshawn found his mother outside the house (A-87), and he called 911 to get medical assistance. (B-13). While Tyshawn was on the telephone to 911, Waples ". . . was just saying that it was an accident, it was an accident, he didn't mean to." (B-13). Tyshawn testified that Waples owned a gun, he had seen it, and he has observed it in Waples' possession. (A-85).

Delaware State Police Corporal Jessica Mitchell was dispatched to a Pine Street address in Lincoln on December 25, 2018, to investigate a report of a shot female. (B-28-29). At 19881 Pine Street a female was being loaded into an ambulance for hospital transport when Corporal Mitchell arrived. (A-89; B-29, 31). Waples was already handcuffed and seated in the back of another police vehicle. (A-89). Waples told Corporal Mitchell that he shot himself in the hand (A-89), and that the firearm was under his pillow. (B-30). Corporal Mitchell did not find a firearm in the bedroom. (B-33).

A second ambulance arrived to transport Waples for the injury to his right hand. (B-19-20). The EMT who assisted Waples testified, "The defendant reported that he had accidentally shot himself in the hand." (B-21). Waples

admitted to the EMT David Buswell (B-18) that he owned the revolver (B-23), and that when he moved the weapon, it went off. (B-22-23).

Delaware State Police Detective Alan Bluto (B-37), who had observed blood at the shooting scene, took a recorded statement (State's Exhibit # 2) from Waples at the Milford hospital. (B-38-39, 42). During this police interview played for the jury, Waples showed Detective Bluto how he pulled the gun from behind his back with his left hand. (B-39). Johnson said she thought Waples was left-handed. (B-6). Although no one else was in the bedroom, Waples denied shooting Johnson. (A-71).

At about 8:40 a.m. that day, Richard R. Parker, Jr. of the Delaware State Police Ballistics Unit (B-47) arrived at the scene. (A-91; B-47). Parker also observed blood both outside and inside the residence. (A-91). After obtaining a search warrant Parker collected a .357 magnum six-shot revolver from the bedroom heating vent ductwork and a projectile from the bedroom wall. (A-91-92; B-48-49). Parker collected portions of bloodstained carpet and took buccal swabs from both Waples and Johnson. (B-50). DNA swabs of the handgun were also done and sent for analysis. (B-50).

Paul Gilbert, a forensic DNA analyst (B-52), testified at trial that Waples' DNA was identified on the handgun (State's Exhibit # 6). (B-48, 56).

Waples elected not to testify at trial (B-59), and the defense did not present any witnesses.

I. THE PROSECUTOR GAVE A VALID RACE-NEUTRAL EPLANATION FOR USE OF A PEREMPTORY JURY CHALLENGE

QUESTION PRESENTED

Did the prosecutor offer a valid race-neutral explanation for a peremptory challenge to a minority potential juror?

STANDARD AND SCOPE OF REVIEW

Under Del. Supr. Ct. R. 8, "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[1]

In reviewing a claim under *Batson v. Kentucky*,[2] whether a party offered a race-neutral explanation for a peremptory jury challenge is reviewed *de novo*.[3]

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[1] Supr. Ct. R. 8.

[2] 476 U.S. 79 (1986).

[3] *Jones v. State*, 940 A.2d 1, 9 (Del. 2007); *Barrow v. State*, 749 A.2d 1230, 1238 (Del. 2000); *Dixon v. State*, 673 A.2d 1220, 1223 (Del. 1996).

MERITS OF THE ARGUMENT

On the morning of January 27, 2020, the Sussex County Superior Court held jury selection in Waples' case where he was charged with possession of a firearm by a person prohibited (PFBPP). (A-7, 9-57). Because the defense stipulated to Waples' status as a person prohibited (A-64-65), the jury's only task was to determine if Waples was in possession of a firearm on December 25, 2018. (A-7). A jury of 12 and 2 alternates was drawn. (A-54-55). While the defense exhausted all of its peremptory jury strikes (A-60), the State indicated it was content 5 times during the jury selection process (A-55-56), and apparently only utilized 2 peremptory jury challenges. (A-54-57). Following jury selection, the Superior Court adjourned for the lunch break. (A-56-57).

When the Superior Court reconvened in the afternoon, defense counsel moved to strike the jury selected that morning, and argued:

> Before we bring the jury in, Your Honor, I would like to make a motion to strike the jury as it is presently composed. I will note that there is not a single minority on the jury.
>
> My client is African-American. I don't think that he feels like this is a fair reflection of a jury by his peers. There was only one minority called as a juror. I think that was Juror No. 1. She was struck. Obviously, it is hard to show a pattern because there is only one, but I would argue that is a 100-percent pattern.
>
> Under *Del. C.* 4501, there is a declaration of policy. It notes that it is the policy of the State that jurors serving in each county shall be selected at random to make a fair cross-section of the population.

(A-59).

Waples' counsel added: ". . . even though the defense exhausted all of its strikes, we remain with an all-white jury. . . . I'm not sure that this even rises to the level of a Batson Challenge." (A-60).

Next, defense counsel said:

> I was told by the State that the person that was struck had a misdemeanor record. So I don't know if this falls into the Batson category or a challenge to the underlying pool. I did some quick math and it looks like out of the whole jury pool that there are only 14 potential jurors who identified as black. Approximately seven of those were struck for cause.
>
> So that would be my application under 10 *Del. C.* 4501 and the Fourteenth Amendment to the US Constitution for equal protection.

(A-60).

The prosecutor denied any *Batson* equal protection violation, and responded: "Your Honor, as to the striking of the one minority juror, the State does not contend that is a pattern at all. We had cause for that. The actual juror did have a criminal record that we felt was reflective of somebody we wouldn't want on the jury panel." (A-60).

Following this exchange with counsel, the trial judge stated:

> As to the one juror who was struck, you didn't bring it to my attention, so I couldn't do anything with it, but I don't know that even that is a threshold to discuss it. But you would have raised it, and I could have addressed it and made a decision, but at least now on the record we have Mr. Tipton's explanation, which would appear to be satisfactory, arguably, as a good reason to strike somebody even

> though this we don't know their reason to strike somebody when they are doing those strikes.

(A-62).

In discussing the defense statutory fair cross-section contention, the trial judge noted: "You know, we have a process. The process, as far as I know, is colorblind and it's not like everybody shows up either. . . . . So we will note your objection and plow on." (A-64).

Although at trial defense counsel was ". . . not sure that this even rises to the level of a Batson Challenge" (A-60), on appeal Waples argues that the trial prosecutor committed a *Batson* violation by utilizing a peremptory jury strike to remove a potential minority juror. Waples is incorrect.

The defense motion to strike the jury was not a forthright *Batson* challenge. (A-60). While the defense mentioned *Batson's* constitutional equal protection rationale , the defense predominantly argued the broader statutory challenge to the jury array under 10 *Del. C.* § 4501. (A-60). Waples did not present the specific *Batson* challenge presented here to the Superior Court in the first instance. Thus, under Supreme Court Rule 8 and general appellate practice, "this Court may not consider questions on appeal unless they were first fairly presented to the trial court for consideration."[4] However, this Court may consider a question for the

[4] *Russell v. State*, 5 A.3d 622, 627 (Del. 2010).

first time on appeal, when the interests of justice so require.[5] Such an issue may then be reviewed on appeal only for plain error, but the burden of persuasion is with the defendant.[6]

". . . [T]he plain error standard is intended to correct errors that are forfeited, not those that are waived. . . ."[7] "Plain error assumes oversight."[8] "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'"[9] "[O]nly forfeited errors are reviewable for plain error."[10] The interests of justice do not require plain error review of Waples' claim here.

Even if Waples' counsel's equivocal statement to the trial judge about not being ". . . sure that this even rises to the levels of a Batson Challenge," (A-60) is not viewed as a waiver of the claim, Waples still cannot demonstrate that the prosecutor's peremptory jury strike of a single minority potential juror constitutes an equal protection violation as recognized in *Batson*.

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[5] *Id.*

[6] *See Brown v. State*, 897 A.2d 748, 753 (Del. 2006).

[7] *Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) (Walsh, J., Dissent).

[8] *Robinson v. State*, 3 A.3d 257, 261 (Del. 2010).

[9] *United States v. Olano*, 507 U.S. 725, 733 (1993).

[10] *Warner v. State*, 2001 WL 1512985, at * 1 (Del. Dec. 12, 2001). *See also Williams v. State*, 34 A.3d 1096, 1098 (Del. 2011); *Robinson v. State*, 3 A.3d 257, 261 (Del. 2010); *Stevens v. State*, 3 A.3d 1070, 1076-77 (Del. 2010).

In *Batson*,[11] the United States Supreme Court held that a prosecutor may exercise peremptory challenges "'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried. . . . [and not based] solely on account of [the jurors'] race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[12] It is a denial of Equal Protection of Law under the Fourteenth Amendment to the United States Constitution when members of a defendant's race are purposefully excluded from the jury.[13] The Equal Protection Clause forbids the State from challenging jurors solely on the basis of race."[14]

Batson mandated a tripartite analysis of a claim that the prosecution used peremptory challenges in a racially discriminatory manner.[15] In *Robertson v. State*,[16] this Court explained the analysis:

> First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges based on race. . . . Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. . . . Finally, the trial court must determine whether

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[11] 476 U.S. 79, 82-83 (1986).

[12] *Batson*, 476 U.S. at 89.

[13] *Id.* at 85.

[14] *Id.* at 89.

[15] *Hernandez v. New York*, 500 U.S. 352, 358 (1991).

[16] *Robertson v. State*, 630 A.2d 1084 (Del. 1993).

> the defendant has carried his burden of proving purposeful discrimination. . . .[17]

A neutral explanation must be ". . . based on something other than the race of the juror."[18] "The second step of [the *Batson* analysis] does not demand an explanation that is persuasive, or even plausible."[19] "In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law."[20] After the prosecutor offers a race-neutral explanation for a peremptory jury challenge, the burden shifts back to the accused to show purposeful discrimination by the State.[21]

"A *Batson* claim presents mixed questions of law and fact."[22] A prosecutor's reason for a peremptory jury challenge is race-neutral "[u]nless a discriminatory intent is inherent in the prosecutor's explanation. . . ."[23]

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[17] *Robertson*, 630 A.2d at 1089 (citing *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991)).

[18] *Hernandez*, 500 U.S. at 360.

[19] *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

[20] *Hernandez v. New York, 500 U.S. 352, 359 (1991).*

[21] *Dixon v. State*, 673 A.2d 1220, 1224 (Del. 1996).

[22] *Riley v. Taylor*, 277 F.3d 261, 277 (3rd Cir. 2001) (*en banc*).

[23] *Dixon*, 673 A.2d at 1224 (quoting *Hernandez*, 500 U.S. at 360).

"The question of intentional discrimination is a pure issue of fact, which must be determined by the Court."[24]

Based on the State Constitutional right to an impartial jury,[25] in 1985 this Court in *Riley v. State* held that the State could not utilize peremptory jury strikes in a racially discriminatory manner.[26] *Riley* "is noteworthy" because it is a year before the United States Supreme Court decision in *Batson v. Kentucky*.[27] The three step analytical paradigm of *Riley* is similar to the tripartite analysis later articulated in *Batson*.[28]

Factual findings of a trial judge are upheld on appeal unless clearly erroneous.[29] The trial court's decision on prosecutorial discriminatory intent in the exercise of peremptory jury challenges is a finding of historical fact that is accorded deference on appeal and is overturned only if it is clearly erroneous.[30] "In the typical peremptory challenge inquiry, the decisive

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[24] *State v. Jones*, 2007 WL 2142917, at * 2 (Del. Super. July 3, 2007), *aff'd*, *Jones v. State*, 940 A.2d 1 (Del. 2007).

[25] Del. Const. Art. I, § 7.

[26] *Riley v. State*, 496 A.2d 997, 1012-13 (Del. 1985).

[27] *Riley v. Taylor*, 277 F.3d 261, 289 (3rd Cir. 2001) (*en banc* and reversing for new trial).

[28] *See Barrow v. State*, 749 A.2d 1230, 1238 (Del. 2000); *Robertson v. State*, 630 A.2d 1084, 1089 (Del. 1993).

[29] *Robertson*, 630 A.2d at 1090; *Baynard v. State*, 518 A.2d 682, 688 (Del. 1986).

[30] *Hernandez v. New York*, 500 U.S. 352, 364 (1991); *Dixon v. State*, 673 A.2d 1220, 1224 (Del. 1996).

question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."[31] Questions of credibility and demeanor of witnesses lie "peculiarly within a trial judge's province."[32]

A finding of a race-neutral explanation for a peremptory challenge largely turns on an evaluation of the prosecutor's credibility. A race-neutral explanation for a jury strike must be ". . . based on something other than the race of the juror."[33] Once a prosecutor offers a race-neutral explanation that is normally sufficient.[34]

It is not clearly erroneous for a trial court to accept a prosecutor's explanation for his exercise of peremptory jury challenges in concluding there is no evidence of discriminatory intent.[35] "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate

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[31] *Hernandez*, 500 U.S. at 365.

[32] *Wainwright v. Witt*, 469 U.S. 412, 428 (1985).

[33] *Hernandez*, 500 U.S. at 360.

[34] *See Robertson*, 630 A.2d at 1089; *Feddiman v. State*, 558 A.2d 278, 285-86 (Del. 1989); *Baynard*, 518 A.2d at 685, 687-88.

[35] *Dixon*, 673 A.2d at 1224; *Robertson*, 630 A.2d at 1090.

impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[36]

Applying these principles to Waples' jury selection, there is no basis for finding any prosecutorial misconduct under either *Batson* or *Riley*. A convicted felon whose civil rights have not been restored is statutorily ineligible to serve on a Delaware State jury.[37] A felon may be removed for cause during jury selection. While a prior misdemeanor conviction does not result in automatic disqualification for State jury service, the juror's misdemeanor record is nevertheless an acceptable race-neutral basis for a peremptory challenge of a potential juror.[38]

In *Dixon*, this Court upheld the removal of two potential black jurors with criminal arrest records. One juror had a misdemeanor theft arrest and a driving while suspended conviction. The second black juror struck by the prosecutor had an arrest record for shoplifting.[39] Potential jurors have also been excluded in Delaware because a relative or family member had a

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[36] *Hernandez*, 500 U.S. at 359-60. *See also Washington v. Davis*, 426 U.S. 229, 239 (1976).

[37] 10 *Del. C.* § 4509(b)(6).

[38] *See Dixon*, 673 A.2d at 1224; *Feddiman*, 558 A.2d at 286-87 (misdemeanor and DUI convictions).

[39] *Dixon*, 673 A.2d at 1224.

criminal record.[40] Thus, utilizing a peremptory jury strike to remove a minority potential juror with a misdemeanor conviction from Waples' jury was not improper prosecutorial conduct.

Defense counsel's statement that "I'm not sure that this even rises to the level of a Batson Challenge." (A-60) is equivocal. The actual trial challenge in Waples' case was based specifically on the policy announcement of 10 *Del. C.* § 4501 (A-60); however, this fair cross-section requirement is normally applied to the entire array of potential jurors, not a single juror removed for a misdemeanor criminal record. (A-60).

In any event, the trial court did follow the three-step analysis of both *Batson* and *Riley*. First, there was a defense motion to strike the jury because there was not a single minority on Waples' jury. (A-59). Second, the prosecutor stated a race-neutral basis ("a criminal record") for striking the minority prospective juror. (A-60). Third, the trial judge found that the prosecutor's "explanation, which would appear to be satisfactory, arguably, as a good reason to strike somebody. . . ." (A-62). This three-step process is sufficient to satisfy equal protection under both the United States and Delaware Constitutions.

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[40] *Baynard v. State*, 518 A.2d 682, 686 (Del. 1986).

The trial judge's factual finding that the prosecutor's rationale for the peremptory jury strike is "satisfactory" (A-62) was not clearly erroneous and is supported by the record.[41] Accordingly, this factual finding is entitled to deference on appeal.[42] Exclusion of a minority potential juror for a misdemeanor criminal record (A-60) is appropriate and does not violate Equal Protection under *Batson.*

[41] *See Barrow v. State*, 749 A.2d 1230, 1238-39 (Del. 2000); *Dixon*, 673 A.2d at 1224.

[42] *Hernandez*, 500 U.S. at 364; *Dixon*, 673 A.2d at 1224.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: March 3, 2022

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	)	
Defendant Below-	)	**No. 368, 2021**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 3rd day of March 2022, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on March 3, 2022, she did serve electronically the attached State's Answering Brief properly addressed to:

Nicole M. Walker, Esquire
Office of Public Defender
Carvel State Office Building
820 North French Street
Wilmington, DE 19801

Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

John W Williams
Notary Public

Member of the Delaware Bar
authorized to act as a Notary Public
pursuant to 29 Del. C. § 4323 (a)(3)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAVAGHN WAPLES,	)	
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Defendant Below-Appellant,	)	**No. 368, 2021**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times Roman 14-point typeface using Micrsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3291 words, which were counted by Microsoft Word.

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