IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO: AAMIYAH DE'NASIA LAMB AND CHRISTOPHER LAMONT BYNUM, JR., MINORS.	)	Case No. 69047 Dist. Ct. No. D-11-446907-R
KEAUNDRA DEBERRY, AAMIYAH DE'NASIA LAMB AND CHRISTOPHER LAMONT BYNUM, JR., MINORS Co- Appellants, vs. CLARK COUNTY DEPARTMENT OF FAMILY SERVICES, Respondents.	)	

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Clerk of Supreme Court

CO-APPELLANTS' ANSWER TO STATE'S PETITION FOR REHEARING

COMES NOW, the Co-Appellants, Keaundra Deberry, natural mother, by and through her attorneys, RANDALL H. PIKE, Assistant Special Public Defender and MELINDA E. SIMPKINS, Chief Deputy Special Public Defender and Aamiyah Lamb and Christopher Bynum, subject minors, by and through their

Docket 69047 Document 2017-38578

attorney, ADRIAN ROSEHILL, Children's Attorney Project, and herein files their Answer to the State's Petition for Rehearing.

DATED this 8th day of November, 2017.

By _____

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ARGUMENT

I. The State's Petition Fails to Meet The Requirements of NRAP 40[1]

"Under NRAP 40(c)(2), this Court may consider petitions for rehearing when a 'material fact in the record or a material question of law in the case' has been overlooked or misapprehended, or when [this Court has] misapplied a controlling decision. A petition for rehearing *will not be considered* when it raises a point for the first time, or when it merely reargues matters previously presented to the Court. NRAP 40(c)(1)." (emphasis added) *Lavi v. Eighth Judicial Dist. Court*, 130 Nev.Adv.Rep. 38, 325 P.3d 1265 (2014) *overruled on other grounds*. The State incorrectly asserts and fails to establish that this Court overlooked or misapprehended either material facts in the record or material questions of law in the case. The State's petition merely reflects disagreement with this Court's decision, which is not the proper basis for a rehearing petition. *McConnell v. State*, 121 Nev. 25, 107 P.3d 1287 (2005) (dismissing rehearing petition based upon State's failure to establish the NRAP 40(c)(2) criteria).

"Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or

[1] Co-Appellants' argument incorporates by reference their Statement of the Case and Statement of the Facts and all arguments raised in their Opening Brief.

misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue." NRAP 40(2). The State's Petition re-argues points already raised or that could have been raised prior to the instant decision. Accordingly, this Petition for Rehearing should be denied.

II. The State Incorrectly Argues the Panel Misapprehended Numerous Facts and Simply Restates Facts Already Argued.

The state makes numerous statements without any evidentiary support or citation to the record. All arguments under this section have either been previously presented or are being raised for the first time on rehearing, a violation of NRAP 40(c)(1).

A. The State Fails to Support the First Time Argument that Ms. Deberry's Relocation Constituted Flight

The state argues that the panel incorrectly characterized Ms. Deberry's activities by stating that she "moved" her family, and argues that testimony was heard during an evidentiary hearing that Ms. Deberry "fled Nevada to avoid DFS involvement." The state fails to provide any citation to the record to support this argument and failed to raise this argument in prior briefing. The State references their own report that simply states their own contention that Ms. Deberry "fled." There was never any evidence heard at the trial to support this contention. The

state's failure to raise the issue prior to a petition for rehearing prevents this court from considering this argument pursuant to NRAP 40(c)(1).

Regardless, even if Ms. Deberry fled Nevada, this is irrelevant to her parenting skills at the time of termination of parental rights and does not overcome the evidence presented that Ms. Deberry completed her case plan, showed behavioral change, and that termination was not in the children's best interest.

B. Dr. Neuman's Medical Report Taken After Personal Observation of Christopher at the Direction of DFS Was Properly Considered.

The state argues that Dr. Neuman's report was inadmissible based on evidentiary grounds. This is not a misapprehension of a fact and is a point raised for the first time. The state's failure to raise the issue prior to the current Petition for Rehearing prevents this court from considering this argument. NRAP 40(c)(1).

While the state argues the document was inadmissible because Dr. Neuman did not authenticate it and was not subject to cross examination, they fail to address the issue that the report was referenced numerous times in DFS reports that were stipulated into evidence. (AA I, pg. 134; pg. 150-155; AA VI, pg. 1059; AA V, pg. 937-938). In the Report filed by DFS for the September 14, 2011 Review Hearing, it states that "On May 11, 2010 Dr. Thomas A. Neumann in Tallulah, Louisiana examined CHRISTOPHER BYNUM Jr. and reports that the injury is well healed with no evidence of abuse." (AA I, pg. 134). The state cannot stipulate to the

admission of evidence, but ask the panel to only consider those portions of the evidence which are self-serving.

C. The Court Correctly Found that Ms. Deberry had Complied With Her Case Plan and Made Progress in Counseling.

For the first time, the state argues that the reports filed with the court *by the state* themselves, should not be considered by the panel since the District Court ultimately terminated, and therefore, did not agree with the reports. Failure to raise the issue prior to a petition for rehearing prevents this court from considering this argument pursuant to NRAP 40(c)(1).

It is concerning that the state is now asking this court to disregard *their own* reports because the reports are favorable to Ms. Deberry and do not support the state's position. The reports were stipulated into evidence (AA VI, pg. 1059; AA V, pg. 937-938), are admissions of a party opponent, and the state provides no reason why they should be excluded. The reports were properly admitted into evidence and properly considered by the panel.

III. The Panel Did Not Misapply Nevada Statutory Authority In Determining the Issue of Parental Fault.

The state claims that the panel misapplied statutory authority, yet simply re-argues the same points raised in the State's prior briefings. In an effort to conserve judicial resources, the undersigned will simply reference the prior argument and

co-appellants' prior response where applicable. It should be noted, however, that both a parental fault *and* best interests determination is necessary to terminate parental rights. *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 762 (2006). When this Court determined that the District Court erred in determining that it was in the children's best interests to terminate parental rights, this was sufficient to reverse the District Court. No further order or explanation was necessary because the termination could not stand once the best interests' determination was reversed.

A. Ms. Deberry was not Neglectful for Failing to Seek Medical Treatment for Christopher's Burn and Provides No Evidence to Support this Contention.

The state, again, argues that Ms. Deberry was neglectful in failing to seek medical treatment for Christopher's burn. (See Petition for Rehearing, pg. 7). This argument has been presented in prior briefs and cannot be reargued pursuant to NRAP 40(c)(1). (See Respondent's Answering Brief, pg. 10, 13). Again, the state fails to cite to any evidence that medical treatment was, in fact, required. The state's failure to support this contention without reference to the record prevents this court from considering this argument pursuant to NRAP 40(2).

In any event, the evidence presented does not support this argument and in fact, showed that the burn was properly attended to. The evidence presented showed

that Ms. Deberry looked at the injury and immediately contacted her mother in Louisiana, who was a nurse of some fifteen years. (AA II, pg. 331). Ms. Deberry's mother indicated to her that she should put ointment on the injury, to watch the burn and if it blistered, immediately take the child to the emergency room. (AA II, pg. 331-332). Ms. Deberry also contacted her employer, who sent over burn cream for Christopher. (AA II, pg. 331-332). When the injury didn't immediately blister and the child was relatively comforted, Ms. Deberry left Christopher with his natural father. (AA II, pg. 331-332).

The state further argues that Ms. Deberry "had not demonstrated any observable behavior change..." and that there was "clear and convincing evidence that Christopher was a neglected child..." without providing a single citation to the record to support either argument. (See Petition for Rehearing, pg. 7). This argument has been presented in prior briefs and cannot be reargued pursuant to NRAP 40(c)(1). (See Respondent's Answering Brief, pg. 11-15). Further, the state's failure to support this contention without reference to the record prevents this court from considering this argument pursuant to NRAP 40(2).

Co-Appellants have previously made arguments in great detail regarding the state's own reports that Ms. Deberry made significant behavioral changes and DFS' admission that Ms. Deberry had completed her case plan other than

admission to holding an iron to Christopher's face. (Co-Appellant's Opening Brief, pg. 40-41). As argued previously, the incident in question was a single, isolated incident and Ms. Deberry completed therapy with *two* separate therapists in addition to parenting classes. (AA II, pg. 231-242, 357;AA III, pg. 488, 503). The evidence produced at trial showed that the therapist, Ms. Fortune, and the case worker noted a marked change in Ms. Deberry's behavior and demeanor. (AA III, pg. 498-499). The state provided no evidence to the contrary.

B. NRS 128.106(1)(g) Only Requires a Consideration of an Unexplained Injury to a Child or Sibling and Does Not Prevent the Court from Consideration of All Other Evidence.

This argument has been presented in prior briefs, even using the same case law, and cannot be reargued pursuant to NRAP 40(c)(1). (See Respondent's Answering Brief, pg. 11-12). Appellant has already addressed this argument in great detail. (See Co-Appellant's Reply Brief, pg. 11-12). In summary, NRS 128.106(1)(g) only requires a *consideration* of the alleged abuse. The court is not required to apply any presumption or inference. In this case, there was a single, isolated incident of an injury, of which there was conflicting evidence as to the state's assertion that the burn was intentional. The statute does not prevent the court from consideration of other factors, including Ms. DeBerry's case plan completion, testimony from her treating therapist, and the best interest of the children. After consideration of all

factors, NRS 128.106(1)(g) does not provide weight towards termination of parental rights in this case.

C. There is No Evidence to Support the Contention that Ms. Deberry is Unfit and the State Failed to Provide Any Reference to the Record to Support This Argument.

This argument has been presented in prior briefs, even using the same case law, and cannot be reargued pursuant to NRAP 40(c)(1). (See Respondent's Answering Brief, pg. 12-13). In short, the state argues, again, that Christopher's burn "speaks for itself" because there was "medical testimony" that the injury was consistent with an iron being held to his face. It is important to note that the State supports this contention by referencing a prior hearing not addressed at the Termination of Parental Rights trial, and is thus, not part of the record. The state's failure to support this contention without reference to the record prevents this court from considering this argument pursuant to NRAP 40(2).

The state fails to address two important arguments raised by co-appellants. First, that there was not sufficient evidence and no finding by the District Court that Ms. DeBerry herself intentionally caused the injury to Christopher. Secondly, the state fails to provide adequate evidence that the burn was intentional. As previously argued by co-appellants, the state's only witness to testify that the burn was intentional, Dr. Mehta, testified that despite best practices, she never saw the

injuries in person, she never spoke with anyone present during the incident, she did not recall any of the photographs she examined of the injury, and did not make a report regarding her examination of the photographs, and did not see the report from Dr. Neuman who actually examined Christopher in-person. (Co-Appellants' Reply Brief, pg. 12; AA V. pg. 910-938). A very troubling issue previously raised by Co-Appellants, is that the State has never admitted into evidence photographs that were reviewed by Dr. Mehta, and still have not provided such, or an explanation as to why they have not been admitted. (Co-Appellants' Reply Brief, pg. 12; AA V, pg. 928). In none of the briefings has the State addressed the fact that the evidence produced at trial showed that Dr. Mehta's "evaluation" of month-old photographs of Christopher's burn was wholly inadequate to have determined the burn was intentional.

D. The State Did Not Provide Any Evidence at Trial and Fails to Cite to Anything in the Record that Demonstrates Ms. Deberry's Behavior Demonstrates a Risk of Serious Physical, Mental, or Emotional Injury to Either Child if Returned Home.

This argument has been presented in prior briefs, even using the same case law, and cannot be reargued pursuant to NRAP 40(c)(1). (See Respondent's Answering Brief, pg. 17-23). Co-Appellants have already addressed this argument, and why it fails, in prior briefings. (See Co-Appellant's Reply Brief pg. 12-13 differentiating *Graham v. State*; See pg. 8-9 differentiating *In the Interest of J.V.*). In short, Co-

Appellants maintain that there has never been a clear and convincing finding that Ms. DeBerry has purposely caused injury to any of her children, including the burn to Christopher. (AA IV, pg. 1058-1064).

As previously argued, this case cannot be analogized with In the *Interest of J.V. a child, (Two Cases)*, 526 S.E.2d 386, 395; 241 Ga. App. 621, 631 (1999) where a child suffered thirteen fractures that were different ages. This had previously been addressed in detail. (See Co-Appellant's Reply Brief, pg. 8-9; See also oral arguments June 1, 2014). Here, a child suffered a single, accidental burn and the state has never provided any evidence that there has *ever* been any other incidents of abuse or neglect and have continuously ignored the fact that Ms. DeBerry has raised another child since his birth in December of 2012 without incident and has been observed by a licensed therapist to be appropriate with that child. (AA II, pg. 232-233; AA III, pg. 480).

The state also cites to two other cases already cited in prior briefings and therefore are inappropriate for re-argument under NRAP 40(c)(1). These cited cases are clearly distinguishable from the case at hand. In *Jesus II*, 672 N.Y.S.2d 485, 249 A.D.2d 846, 84 (1998), a mother's rights were terminated because of a complete lack of case plan progress in conjunction with complete denial of

culpability. Here, Ms. DeBerry has both completed her case plan and has admitted culpability by admitting to a lack of supervision of Christopher.

Similarly, the state relies on *In the Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997) where the child sustained a subdural hematoma and retinal hemorrhages, consistent with shaken baby syndrome and inconsistent with the parents' explanation. (491 S.E.2d at 611). Further, neither parent ever acknowledged that any abuse or neglect of Taylor B. occurred yet abuse and neglect in Taylor B was found to have been proven by clear and convincing evidence. (*Id* at 612, 615). The injuries in *Taylor B.* were much more significant than as were seen here and are not analogous. Here, the burn was a result of a single incident, and there has never been a clear and convincing finding that Ms. DeBerry burned Christopher. Also notable, the state's only witness to testify regarding the burn, Dr. Mehta, never testified the burn was the result of abuse, even after testifying it is possible to make a medical diagnosis of abuse. (AA V, pg. 933-934). Dr. Mehta only testified that the injury was not consistent with the explanation given, and further testified that the explanation she understood was that Christopher "kissed" the iron and understood that to mean Christopher held the iron to his own face. (AA V, pg. 914-918, 933-934).

The State's arguments continue to erroneously rely on the inaccurate conclusion that Ms. DeBerry's explanation is inconsistent with medical evidence when this is not the case. At the Rehearing, the state provided grossly inadequate evidence that Christopher's injuries were the result of an intentional act. Dr. Mehta did not testify the burn was the result of abuse or an intentional act; she was only able to testify it was not consistent with Christopher putting the iron to his own face. (AA V, pg. 918).

Further, Dr. Mehta's testimony revealed extreme handicaps to her "assessment." In addition to testifying she never examined Christopher in person, Dr. Mehta couldn't recall how many photographs she reviewed, she did not review any photos in preparation for her testimony at the rehearing, having only reviewed her prior testimony, and never made any reports in regards to her evaluation of the photos. (AA V, pg. 926-928). The State has never entered into evidence any photos purported to have been reviewed by D. Mehta. (AA V, pg. 931-932). Dr. Mehta was never given alternative explanations including that the iron may have fell on Christopher, and was not given alternative medical records at the time she rendered her opinion, although the State was in possession of a report made by a doctor who evaluated the child in person and was not given any medical history or any information in regards to the motor skills of Christopher. (AA V, pg. 920-926,

937). Dr. Mehta did not speak to either party known to have been in the vicinity during the incident and not given any additional scene information (AA V, pg. 921, 935-936). During her testimony, Dr. Mehta conceded that an accidental cause of the injury was possible (AA V, pg. 946-947).

IV. This Court's Citation to *Spevack v. Klein*, 385 U.S. 511, 514-15 (1967) was *not* Inconsistent with *Baxter et. al. v. Palmigiano*, 425 U.S. 308 (1976)

The state argues that, in civil cases, a person can be forced to choose between invoking their Fifth Amendment privilege and *fundamental* rights. (Petition, pg. 14, ln. 18). The state raises this argument for the first time in their Petition for Rehearing. "A petition for rehearing *will not be considered* when it raises a point for the first time. . ." NRAP 40(c)(1)."

The state cites to *Baxter et. al. v. Palmigiano*, 425 U.S. 308 (1976) for the proposition that a parent, in a civil death penalty case, can be forced to choose between invoking their Fifth Amendment rights and their Fundamental Rights to raise their children. However, *Baxter v. Palmigiano* dealt with procedures required at prison disciplinary proceedings, whether prisoners were entitled to invoke their Fifth Amendment rights and whether that invocation could be used against them in the form of an adverse inference. The right to due process at prison disciplinary proceedings is not a *fundamental* right on par with the rights at issue here.

The Supreme Court went on to indicate that because a prisoner's silence in prison disciplinary proceedings does not *automatically* mean he's guilty of an infraction, a permissive adverse inference which is supported by other evidence may be drawn based upon the prisoner's silence. The Court cautioned, however, that "[I]f inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered "whatever immunity is required to supplant the privilege" and may not be required to "waive such immunity." *Id. at* 316.

The issue was the *compulsion*: "Thus, it is undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different from the circumstances before the court in the *Garrity-Lefkowitz* decisions, where refusal to submit to interrogation and to waive the *Fifth Amendment* privilege, standing alone without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, the failure to respond to interrogation was treated as a final admission of guilt." *Id.* at 317-18.

This is exactly what happened to Keaundra DeBerry; she refused to incriminate herself, which was treated as a "final admission of guilt" and her parental rights were terminated. This isn't about drawing an adverse inference because she

refused to confess, this is about the state of Nevada and the Court requiring her to incriminate herself or to automatically lose her children – an improper compulsion. Accordingly, *Baxter et. al. v. Palmigiano*, 425 U.S. 308 (1976) is not inconsistent with *Spevack v. Klein*, 385 U.S. 511, 514-15 (1967) and the State's argument is misplaced.

Neither does the case of *In re Samantha C.*, 268 Conn. 614, 847 A.2d 883 (2004), support the state's argument. There, the Connecticut Supreme Court cited to *Baxter et. al. v. Palmigiano*, 425 U.S. 308 (1976) and noted that silence in proper circumstances can be used as evidence, but not in the case of compelled self-incrimination. *In re Samantha C.*, 268 Conn. 614, 636, 847 A.2d 883, 898-99 (2004). The Connecticut Supreme Court went on to state that: "An adverse inference, however, does not supply proof of any particular fact; rather, it may be used only to *weigh* facts already in evidence." *Id.* at 847 A.2d, at 899.

Neither does *Balt. City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 110 S.Ct. 900, 107 L.Ed.2d 992 (1990) support the state's argument. That case did not deal with compelled testimony either. In that case, the child was removed from the mother, adjudicated as a neglected child and returned to the mother subject to court ordered rules and regulations. When the state demanded return of the child and the mother refused and invoked her Fifth Amendment rights, she was held in

contempt. There, the Court found that "[w]hen a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is reduced." *Id.* at 110 S.Ct. at 906. The Court indicated that, because the child in that case was placed with the mother subject to the court's order, the mother, having accepted the placement, could not rely upon the Fifth Amendment privilege to subsequently refuse to turn over the child. Keaundra DeBerry never had custody of her children subject to the court's order. Accordingly, *Bouknight* does not support the state's argument that Keaundra DeBerry can be compelled to incriminate herself.

In the instant matter, there was no evidence that indicates the District Court drew an adverse inference or that Keaundra DeBerry had placement of her children subject to the court's direction. Keaundra DeBerry's parental rights were terminated solely because she refused to admit that she committed a crime. Accordingly, the state's argument fails.

V. Prior Decisions of this Court Cited by the State Dealt with Whether Child Protective Services was Required to Give *Miranda* Warnings Before Questioning a Parent

The case of *Mejia v. State*, 122 Nev. 487 (2006) stands for the proposition that a CPS Investigator does not have to advise a parent of their rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) when

questioning them about suspected abuse or neglect. It does not support the state's assertion that this Court ignored precedent – *Miranda* warnings are different that compelling a person to incriminate themselves.

In finding that the CPS Investigator's questioning of Mejia did not require *Miranda* warnings, this Court *never* indicated that Mejia had no Fifth Amendment rights. What this Court indicated that, where there was no restraint of movement, *Miranda* did not apply. *Mejia* only held that CPS doesn't have to warn a parent that his answers could be used against him in a criminal trial. It did not deal with compelling a parent to admit to a crime or lose their parental rights.

VI. The Panel Clearly Did Not Fail to Address the Nevada Precedent of *Meyer v. Second Judicial District Court*

This argument has been presented in prior briefs and cannot be reargued pursuant to NRAP 40(c)(1). (See Respondent's Answering Brief, pg. 23). The state simply reiterates their previous argument that the therapy that Keaundra DeBerry completed – with the therapist the Department sent her to (AA III, pg. 393) – was deemed insufficient by the State and the Court and, therefore, parental rights were properly terminated. The state ignores the fact that there was no evidence presented contradicting the testimony of the therapist, Ms. Jane Fortune, that Keaundra DeBerry was not a danger to her children. (AA II,

pg. 232-233). The state fails to cite to any portions of the record that support their claim.

The state cites a custody case, *Myer v. Second Judicial District Court*, 95 Nev. 176, 180-81, 591 P.2d 259, 262-63 (1979), where this Court upheld a lower court's order preventing a mother from testifying at trial in a custody proceeding because she had invoked her Fifth Amendment rights in a deposition. *Id.* at 178. The trial court in *Myer specifically ordered* the deposition testimony sealed in order to protect the natural mother's Fifth Amendment rights.

Myer is not comparable to the instant matter. *Myer* was a custody matter and neither parent was in danger of losing their fundamental rights. The order in *Myer* allowed for protections from criminal prosecution. No such protections have ever been offered to Ms. DeBerry. (*See* Order of Reversal, pg. 7).

Thus, the District Court terminated the parental rights of Ms. DeBerry on the grounds that she has failed to admit to a crime. This violated Ms. DeBerry's Fifth Amendment rights. Both of Ms. DeBerry's therapists reported her successful completion of their programs. (AA II, pg. 231-242; AA III, pg. 488). This Honorable Court did not fail to address Nevada precedent; Meyer *v. Second Judicial District Court*, 95 Nev. 176, 519 P.2d 259 (1979) did not

address the compulsion of a mother to either waive her Fifth Amendment rights or lose her children permanently.

CONCLUSION

Based upon the arguments above, Ms. DeBerry, Aamiyah Lamb and Christopher Bynum Jr. herein respectfully requests that this Court Deny the State's Petition for Rehearing.

DATED this 8th day of November, 2017.

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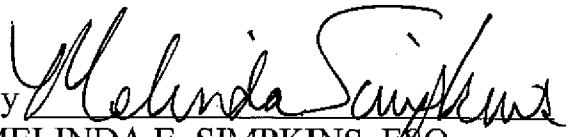
CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Co-Appellant's Answer to Petition for Rehearing, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 32(a)(4) - (6), that the typeface is Times New Roman in 14 point font and that it complies with the page or type-volume limitations. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of November, 2017.

By 

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 8th day of November, 2017, a copy of the Co-Appellant's Answer to State's Petition for Rehearing was served as follows:

BY ELECTRONIC FILING TO

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