IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC DEAN WERRE,

Appellant

v.

THE STATE OF NEVADA,

Respondent

Docket No. 84234

Appeal From Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)

Third Judicial District Court, Lyon County, Nevada
Case No. 21-CV-00291

The Honorable Leon Aberasturi, District Court Judge

RESPONDENT'S ANSWERING BRIEF

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I. ROUTING STATEMENT

This is an appeal of an order denying Mr. Werre's postconviction petition for writ of habeas corpus that involves a challenge to a judgment of conviction or sentence for offenses that are category B felonies. The case is presumptively assigned to the Court of Appeals because it is "postconviction appeal that involve a challenge to a judgment of conviction or sentence for offenses that are not category A felonies. NRAP 17(b)(3).

II. ISSUES PRESENTED FOR REVIEW

A. Are the changes to criminal penalties enacted in AB236 relevant to an Eighth Amendment challenge, even if they are not retroactive?

B. Did the District Court abuse its discretion in finding that trial counsel rendered effective assistance of counsel?

III. STATEMENT OF THE CASE

The Lyon County Sheriff's Office arrested Eric Werre on or about January 2, 2020. Appellant's Appendix, Volume 1, page 54 (hereinafter AA 1:54). The State filed an amended criminal complaint charging Appellant with thirty five counts. AA 1:1-14. The Appellant unconditionally waived his preliminary hearing on February 20, 2020. Respondent's Appendix, page 72 (hereinafter RA 72).

The State filed an Information in the district court on February 25, 2020, containing four counts: Trafficking in a Controlled Substance, a Category A Felony in violation of NRS 453.3385(1)(b); Principal to Burglary, gaining possession of a firearm and/or deadly weapon, a Category B Felony in violation of NRS 205.060(4); and, two counts of Principal to Possession of a Stolen Firearm, Category B Felonies in violation of NRS 205.275. AA 1:15. Werre appeared with his counsel on March 2, 2020, and he entered a guilty plea to the four counts contained in the Information. RA 79-80. Werre filed a written guilty plea agreement with the district court on March 2, 2020. AA 1:48.

Werre appeared for sentencing on April 20, 2020 with his counsel. The district court sentenced Mr. Werre to 72-180 months on Count I; 72-180 months on Count II, consecutive to Count I; 36-120 months on Count III and 36 months on Count IV, concurrent to counts I and II. RA 91; 120. The aggregate sentence was one hundred and forty four months (144) to three hundred and sixty months (360) in Nevada State Prison. RA 120. The Judgment of Conviction was filed April 28, 2020, along with an Order clarifying the pronouncement of sentence. RA 89; 120. Mr. Werre did not file a direct appeal.

On March 12, 2021, Werre filed a Petition for Writ of Habeas Corpus. AA 2:70. On March 16, 2021, Werre filed the legal arguments in support of the Petition. RA 1. The State filed its Response on March 22, 2021. RA 47. Werre

filed a Reply to the State's Opposition. RA 59. The district court held an evidentiary hearing on the Petition on January 4, 2022. AA 2:114-3:195. The Court entered its Order Denying the Petition on January 26, 2022. AA 3:196. Werre filed an appeal from the district court order.

IV. STATEMENT OF FACTS

On December 30, 2019, the Lyon County Sheriff's Office responded to a report of a burglary in Silver Springs. AA 1:60. The reporting person said at least eighty firearms, numerous firearms parts, and ammunition were missing from the building. Sparks Police Department contacted the Lyon County Sheriff's Office and reported that someone had seen over seventy firearms on December 11, 2019 at 2920 West Fir Street in Silver Springs. During surveillance of the house on Fir Street, law enforcement noticed Eric Werre, the appellant, as one of three people at the house. Officer waited for two occupants to leave the house before the officers executed a search warrant. When the warrant was executed, Werre was the only person present. Officers found a small amount of methamphetamine on Werre when they first searched him. During the search of the house officers found several firearms, parts and ammunition. In addition, officers found a significant amount of methamphetamine during the search of the house, totaling over 100 grams aggregate gross weight. In the garage officers located a motorcycle reported stolen out of Modesto, California. Officer saw Werre riding that same motorcycle several

times on the day of the search. Id. These facts are taken from the offense synopsis contained in the PSI and part of the Appellant's Appendix. AA 1:60-64.

Gene Kelly testified at the sentencing hearing. He owned the location where Werre and the other burglarized and too the firearms and related property. RA 99. Mr. Kelly described the damage to the building and property. RA 100. He described the items that were stolen. RA 101. Mr. Kelly testified that the "damage was significant. It was focused. The theft was comprehensive." RA 101. Mr. Kelly estimated 100 firearms were stolen, some of which were personal and irreplaceable. RA 104. The district court ordered $113,137.07 in restitution in this case. RA 92.

V. SUMMARY OF THE ARGUMENT

The penalties under the law for which the Court convicted Mr. Werre are not cruel and unusual punishment pursuant to the Eighth Amendment. The adoption of different and reduced penalties does not render the penalties under the former law invalid or unconstitutional. Appellant also asks this court to consider the changes in penalties without looking at the actual plea agreement in the district court and the related penalties, and the sentence imposed by the court.

Trial counsel provided effective assistance of counsel at all stages of the proceedings, including the plea negotiations and sentencing. Further, Mr. Werre cannot establish prejudice even if counsel's performance fell below a reasonable

standard. Lastly, the district court's findings were supported by substantial evidence and the district court properly denied the petition in accordance with Nevada law.

VI. ARGUMENT

STANDARD OF REVIEW

A district court's resolution of ineffective assistance of counsel claims is reviewed de novo, giving deference to the district court's factual findings if "they are supported by substantial evidence and are not clearly wrong." *Lader v. Warden*, 121 Nev. 682, 686 (2005).

A. Are the changes to criminal penalties enacted in AB236 relevant to an Eighth Amendment challenge, even if they are not retroactive

A sentence within the statutory limits is not "cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221–22 (1979). *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996). Blume did not challenge the constitutionality of the statute and the Nevada Supreme Court denied the request. Similarly, Werre has not challenged the constitutionality of any of the statutes for

which he pleaded guilty and was sentenced. As such, this court must deny the claim.

Mr. Werre contends that the changes in AB236 render the sentence disproportionate to the offense as to shock the conscience. This argument fails for several reasons.

First, it completely disregards the plea negotiations and plea agreement in this case. Trial counsel testified at the evidentiary hearing that he spent considerable time in this case working on the plea negotiations. AA, Vol. 3:162. The plea negotiations considered the ramifications of AB236 and the pending changes associated with that legislation. Id. Trial counsel further testified that he was successful in getting the Deputy DA assigned to the case to consider AB236. Id.

Second, it ignores the original charges filed in this case. The State charged Mr. Werre in the Amended Criminal Complaint with thirty-five counts, including a trafficking in controlled substances category A felony. AA 1:1-14. During the course of the negotiations, trial counsel negotiated the category A drug charge to a category B charge, substantially reducing the possible prison time for Mr. Werre. Even if this offense was charged after July 1, 2020, the penalty for the amount of methamphetamine that Mr. Werre was charged with possessing (over eighty-five grams) would carry a penalty of two to fifteen years in Nevada State Prison, the

same penalty that he faced under the plea agreement and sentence in this case. See NRS 453.336(2)(e). In addition, the penalties for the possession of stolen firearm and burglary gaining possession of a firearm charges did not change after AB236. See NRS 205.060(5); NRS 205.275(2)(d).

Third, it requires this court to ignore its long standing precedent on retroactivity of changes to criminal statutes. Neither counsel nor district court is at liberty to ignore the law with respect to criminal penalties. The district court must take into account the ramifications of sentencing and how certain actions will impact not only the defendant, but other cases that have or may come before the court. .

This court has long held that a penalty provision is not retroactive unless the legislature clearly states that it is retroactive. Assembly Bill (AB) 236, 80th Leg. (Nev. 2019), does not apply retroactively and therefore is of no application in this case. The penalty provisions apply only to offenses occurring after July 1, 2020. Mr. Werre committee the offenses in December 2019 and January 2020. Trial counsel was effective for using AB236 in negotiating the plea agreement in this case. Whether or not the District Attorney's Office considered it is not relevant.

In *State v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008), the defendant pled guilty in district court. Sentencing was set for September 28, 2007. Prior to sentencing, the Nevada

Legislature enacted AB 510 and altered the deadly weapon enhancement scheme. The district court altered its sentence based on the newly enacted AB 510. The legislature listed the effective date as July 1, 2007 and did not include any indication that it should apply retroactively. The State then filed a writ of mandamus.

The Nevada Supreme Court specifically addressed the issue of retroactivity. The Nevada Supreme Court held, "that unless the Legislature clearly expresses its intent to apply a law retroactively, Nevada law requires the application of the law in effect at the time of the commission of a crime." *State v. Second Judicial Dist. Court ex rel. County of Washoe,* 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). The Nevada Supreme Court provided that the penalty that a defendant should be sentenced under is the one at the time of the commission of the crime and not the penalty at the time of sentencing. *Id.* The Supreme Court discussed the public policy concerns with retroactivity, stating:

> We conclude instead that it is irrational to have a sentencing scheme whereby defendants could benefit by manipulating the date of their sentencing hearings or by becoming fugitives from justice. Problematically, under Pullin's suggested sentencing scheme, two codefendants, charged with the commission of the same crime, could be sentenced differently based upon the time that each one is sentenced. In such a situation, one codefendant could come forward, confess to the crime, plead guilty, and be sentenced, while his cohort remained a fugitive from justice. Unless the general rule applied, the fugitive would be eligible to receive the benefit of any ameliorative changes in the applicable sentencing scheme. We conclude that this is an illogical and unjust result. As this court previously concluded in *Castillo*, such a result offends traditional notions of fairness and justice.

Id. at 570, 188 P.3d at 1083. Likewise in this case, Petitioner's sentence does not depend on the date of sentencing and counsel cannot manipulate the penalty by arguing that the district court or this Court should consider the reduced penalties in the case even though the changes do not apply to this case.

A search of all the minutes concerning AB 236 is void of any mention of serious comments or serious contemplation of AB 236 applying retroactively. In fact, the opposite is quite true. Retroactivity is not part of AB 236. The amendments to the trafficking statute, NRS 453.3385, are included in Section 119 of the AB236. The provisions of Section 119 become effective on July 1, 2020. See AB 236, Sec. 137, Assembly Bill 236, 80th Leg. (Nev. 2019). In addition, the Nevada Legislature has had the opportunity to address retroactivity in the 2021 Session. The Legislature has not done so.

Although Werre acknowledges that his argument is not that AB236 applies retroactively, his argument that the court should consider it in the sentencing and counsel should use it in argument, would result in essentially retroactive application, thereby ignoring precedent and legislative history.

Finally, the district court sentence was less than the recommendation of the State and well below the maximum sentence allowed under the law. The State asked for 180 to 480 months in Nevada state prison. The district court sentenced

Mr. Werre to 144 to 360 months, almost four years less on the bottom end and ten years less on the top end from the sentence the State recommended to the district court. The Division of Parole and Probation recommended 88 to 312 months in Nevada State Prison. AA 1:64. The district court sentence is reasonable based upon the facts and circumstances of this case, including the recommendation of Werre's trial counsel, the Division of Parole and Probation, and the State.

B. Did the district court abuse its discretion finding that counsel rendered effective assistance of counsel?

The United States Supreme Court has recognized and confirmed that "the right to counsel is the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *State v. Love* 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under the two-prong *Strickland* test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); *Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787, 178 L. Ed. 2d 624 (2011).

"Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '(w)ithin the range of competence demanded of attorneys in criminal cases.'" *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

The court's role in reviewing ineffective assistance of counsel claims is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing *Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir. 1977)). The ineffective assistance of counsel analysis does not suggest that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success."

Donovan, 94 Nev. at 675, 584P.2d at 711. The court should also "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

The Constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *United States v. Cronic*, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984). "Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel's strategy decisions are "tactical" decisions and will be "virtually unchallengeable absent extraordinary circumstances." *Id*. at 846, 921 P.2d at 280; see also *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." *Dawson v. State*, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). Trial counsel alone and not the client has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." *Rhyne v. State*, 118 Nev.

1, 8, 38 P.3d 163, 167 (2002) citing *Wainwright v. Sykes*, 433 U.S. 72, 93, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The petitioner has the burden of proof and must establish the facts underlying his ineffective assistance claim by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004). There is a presumption that trial counsel discharged his duties. *Davis v. State*, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).

Claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. *Id*. Petitioners must allege specific facts supporting the claims in the petition. Failure to allege specific facts rather than just conclusions is a basis for the petition to be dismissed. NRS 34.735(6).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice. A defendant who pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that he received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution." *Molina v. State*,

120 Nev. 185, 190–91, 87 P.3d 533, 537 (2004). Guilty pleas are presumptively valid, especially when entered on advice of counsel, and a defendant has a heavy burden to show the district court that he did not enter his plea knowingly, intelligently, or voluntarily. *Id.* To establish prejudice in the context of a challenge to a guilty plea based upon an assertion of ineffective assistance of counsel, the petitioner must "demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 191.

Effective assistance of counsel extends to plea negotiations and the recommendation to accept a plea. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012). Counsel must evaluate the plea agreement in terms of the evidence and other likely outcomes in the case and advise the petitioner accordingly.

Having in mind the foregoing standards, the State responds to Werre's claims regarding trial counsel.

1. Werre's Testimony that the Drugs Were Not his and Trial Counsel Decision to Not Hire an Investigator do not Constitute Ineffective Assistance of Counsel

Werre argues that if trial counsel hired an investigator, he would have discovered that Werre was actually innocent of the trafficking charge. Werre bases

this unsupported claim on Mr. Werre's self-serving testimony at the evidentiary hearing. As was pointed out during the hearing, Mr. Werre had a significant prior criminal history, including numerous felony convictions. AA 2:132-134. A claim of actual innocence was never properly before the district court or this court. The trafficking charge was a negotiated plea and Mr. Werre entered a guilty plea. RA 79. If Mr. Werre wanted to claim innocence he would have to file a petition to establish factual innocence pursuant to NRS 34.900 et. Seq. Werre asks this court to disregard the requirements for such a petition, likely because he cannot meet the statutory requirements to file one. See e.g. NRS 34.920.

Werre makes unsupported conclusions, such as an investigator would have allowed the defense attorney to negotiate a lesser sentence with the prosecutor. This belies the record and is contrary to trial counsel's testimony at the evidentiary hearing. Trial counsel testified that AB236 was part of the negotiation. AA 3:162. Trial counsel further testified that he was successful in getting the prosecutor to consider that in regards to the case. The evidence in this case supported Mr. Werre's significant involvement in the drug activity and gun sales in this case. Two victims testified to the significant loss which they suffered in this case at the hands of Mr. Werre and the codefendants. RA 98-108. Mr. Werre and the codefendants broke into the building and a Conex container located inside the building and took numerous firearms. Id. Mr. Werre and the others worked

together to obtain a truck to transport the stolen guns and ammunition, they loaded the guns and ammunition into the truck where they then took the firearms and ammunition to California where they sold the guns on the black market for cash. RA 110-111. Inside the house where Mr. Werre was staying law enforcement found a large quantity of methamphetamine, around 100 grams. RA 109-111; AA 1:60-63. The district court ordered Mr. Werre to pay $113,137.07 in restitution in this case. RA 92. In short, the evidence of Mr. Werre's guilt in this case is overwhelming and he received a reasonable plea negotiation in this case. The employment of an investigator would not have led to new evidence or new defenses, and it would not have changed the outcome of this case. Above all it would not have established Mr. Werre's innocence with regard to the drug charge or any other charges.

2. Werre's Claims that Trial Counsel was Ineffective at Sentencing are not Supported By the Evidence or the Record

Werre argues that his counsel was ineffective at sentencing for failing to argue for the Parole and Probation recommended sentence. In this case, Parole and Probation recommended 88 to 31 months in Nevada State Prison. AA 1:64. Trial counsel actually asked for a lesser sentence than Parole and Probation, specifically, that all of the sentences suggested by probation run concurrent to one another. RA 112. Trial counsel made reasonable arguments to support the concurrent sentence

recommendation, including the need to start paying restitution, family support and that the offenses were really part of one common scheme. RA 113-114.

"Bare" and "naked" allegations are not sufficient for the court to sustain a claim of ineffective assistance of counsel, nor are facts that are belied and repelled by the record. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Petitioners must allege specific facts supporting the claims in the petition. Failure to allege specific facts rather than just conclusions is a basis for the petition to be dismissed. NRS 34.735(6). In this case, Werre raises allegations that are merely allegations not supported by the record or facts of this case, and in fact, the allegations or belied and repelled by the record.

The district judge considered all of these sentencing arguments and determined that trial counsel testified credibly at the evidentiary hearing and that trial counsel tried to gather additional mitigation evidence. AA 4:209. The district court also found that even if trial counsel did not meet the Strickland standards, Werre still failed to establish any prejudice. Id. These findings and conclusions are supported by the record and should not be disturbed in this case.

Werre's argument that somehow trial counsel should have argued for a sentence longer than what he did argue for, and that would have changed the outcome, is nonsensical. Additionally, trial counsel did not testify that the Parole and Probation recommendation was absurd, contrary to the claim in the opening

brief. Rather, trial counsel testified "if I give an absolutely absurd recommendation for a sentencing, it's likely that a judge is not going to listen to anything that I have to say on the subject if I'm already coming off as absurd." AA 3:166. This explained why trial counsel believed that a prison recommendation, albeit less than the State or Parole and Probation recommended, was the best chance for Mr. Werre in this case. Trial counsel made reasonable and supported tactical decisions on how best to present mitigation in support of his client. This was a reasonable decision by counsel that did not violate the tenets of *Strickland* and its progeny. The district court's decision should be upheld.

VII. CONCLUSION

Mr. Werre asks this court to overturn the district court's decision on the Petition. His arguments fail. First, the penalty amendments adopted as part of AB236 do not render the prior penalties unconstitutional. The district court sentenced Mr. Werre under the proper law and the sentence was within the penalties provided by the statute.

Mr. Werre did not meet his burden to establish by a preponderance of the evidence that (1) counsels' performance was deficient and (2) that he was prejudiced by such deficient representation. He has not established either prong of the Strickland standard in this case. Mr. Werre received effective assistance of counsel under the standards established by this Court. He received a fair plea

agreement which, but for the hard and diligent work of his counsel, he would not have received and he may be facing a longer prison sentence.

Dated this 4th day of April, 2022.

/S/

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VIII. ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6), and either the page- or type-volume limitations stated in NRAP 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(A)(ii) it is proportionately spaced, has a typeface of 14 points or more, and contains 4291 words and does not exceed 1,300 lines of text.

3. Finally, I hereby certify that I have read this appellate brief, 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, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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.

/S/
Stephen B. Rye
District Attorney
Attorney for Respondent

IX. CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 4, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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