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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PRENTISS BUTCHER,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 428, 2016
	)	
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: February 10, 2017

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NATURE AND STAGE OF THE PROCEEDINGS

On March 23, 2015, police arrested the appellant, Prentiss Butcher, for various weapons offenses. A1. On July 6, 2015, a New Castle County grand jury indicted Butcher on charges of possession of a firearm by a person prohibited ("PFBPP"), possession of ammunition by a person prohibited ("PABPP"), and carrying a concealed deadly weapon ("CCDW"). A1, A6-7. A two-day jury trial began on November 16, 2015. A3-4. On November 17, 2015, the jury found Butcher guilty as charged. A4.

On July 19, 2016, the Superior Court sentenced Butcher for PFBPP to fifteen years of incarceration at Level V, suspended after ten years for five years at Level IV supervision, suspended after six months for two years at Level III probation. A48. The Court also sentenced Butcher to five years at Level V, suspended for one year at Level III probation (concurrent) for both PABPP and CCDW. A49. This appeal ensued.

Butcher filed a timely notice of appeal and opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENTS

I. Appellant's argument is denied. The plain language of 11 *Del. C.* § 1448(e)(1)c requires that a person convicted of possession of a firearm by a person prohibited shall receive a minimum sentence of "[t]en years at Level V, if the person has been convicted on 2 or more separate occasions of any violent felony." Butcher meets this unambiguous statutory requirement because he was convicted of what was defined as a violent felony when he was convicted of possession of a controlled substance within 300 feet of a park, and subsequently convicted of another violent felony - possession with intent to deliver heroin. The Superior Court properly sentenced him to the applicable ten-year minimum enhanced penalty set forth in section 1448 for those felons convicted of PFBPP with two previous convictions for any violent felonies.

II. Appellant's argument is denied. Butcher's due process rights were not violated because he had fair notice that he had been previously convicted of two violent felonies at the time he elected to illegally possess a firearm.

STATEMENT OF FACTS

On March 23, 2015, Detective Matthew Rosaio and Officer Joseph Scioli of Wilmington Police Department's Safe Streets Unit were on patrol in an unmarked vehicle in the City of Wilmington. B-18; 28. The officers conducted a traffic stop of a grey Ford Taurus that had no working tail lights or tag light. B-28; 29. The Taurus had three occupants, two in the front and one seated behind the driver's seat. B-18.

Det. Rosaio approached the driver's side of the vehicle while Off. Scioli approached the passenger side. B-28. Both officers smelled marijuana. B-18; 28. While awaiting backup, the officers engaged the vehicle occupants in conversation and observed them. B-18; 28. The appellant, Prentiss Butcher, was seated in the backseat behind the driver. B-28; 30. Butcher appeared nervous, was breathing heavily, and stuttered when asked to give his name and date of birth. B-18; 24. Butcher held his right arm tight across his body in an unnatural position and frequently looked down at his waistband area. B-18; 28.

Once backup officers had arrived, Det. Rosaio asked Butcher to step out of the vehicle. B-18. As he stepped out, Butcher continued to press his right arm against his side. B-18. Det. Rosaio asked Butcher to place his hands on the top of the vehicle to enable a pat down. B-19; 34. Butcher did not raise either arm and dropped his left arm towards his waist. B-19. Det. Rosaio physically placed both

Butcher's hands on top of the vehicle and patted him down, finding a gun in the front waistband of Butcher's pants. B-19; 34. Det. Rosaio alerted the other officers present by shouting "gun". B-19; 29; 34. Butcher was taken into custody and the firearm removed from his waistband. B-19. Butcher was wearing a large green jacket over the top of a t-shirt that concealed the weapon. B-19. The recovered weapon was a silver Ruger .22-caliber semi-automatic handgun, loaded with 11 rounds of ammunition, one of which was in the chamber. B-19; 27.

Butcher stipulated at trial that he was a person prohibited from owning, possessing or controlling a firearm or ammunition for a firearm. B-36.

I. THE SUPERIOR COURT CORRECTLY SENTENCED BUTCHER TO SERVE THE MANDATORY MINIMUM SENTENCE REQUIRED BY 11 *DEL. C.* § 1448(e)(1)c.

Question Presented

Whether the Superior Court properly found that Butcher had two qualifying prior violent felony convictions requiring the imposition of a ten-year minimum mandatory sentence pursuant to 11 *Del. C.* § 1448(e)(1)c.

Standard and Scope of Review

This Court reviews "statutory construction issues *de novo* to determine if the Superior Court erred as a matter of law in formulating or applying legal precepts."[1]

Merits

In 2010, Prentiss Butcher was found guilty after a stipulated trial of one count of possession of cocaine within 300 feet of a park (16 *Del. C.* § 4768).[2] B-1. In 2011, Butcher pleaded guilty to possession with intent to deliver heroin (16 *Del. C.* § 4751). B-4. At the time Butcher committed these two offenses, both offenses were classified as violent felonies pursuant to 11 *Del. C.* § 4201(c).[3]

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[1] *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998) (citing *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993); *Watson v. Burgan*, 610 A.2d 1364, 1367 (Del. 1992).

[2] The Superior Court terminated Butcher from a diversion program after he failed to appear at a status conference. *See* B-1.

[3] *See* 11 *Del. C.* § 4201(c) (2009).

In March 2015, police arrested Butcher on the instant weapons charges. The New Castle County grand jury indicted Butcher on July 6, 2015 for three weapons offenses. A6. In November 2015, a Superior Court jury found Butcher guilty, *inter alia*, of possession of a firearm by a person prohibited (PFBPP) in violation of 11 *Del. C.* § 1448(a)(3). A4.

At the July 2016 Superior Court sentencing, defense counsel for Butcher argued that Butcher should not be subject to the ten-year minimum Level V enhanced sentence of 11 *Del. C.* § 1448(e)(1)c for the November 2015 PFBPP conviction. A14-23. Buthcher's argument in both the Superior Court and this Court is that the enhanced sentencing provision of section 1448(e)(1)c should not apply to him because he is not a person who "has been convicted on 2 or more separate occasions of any violent felony." 11 *Del. C.* § 1448(e)(1)c.

Butcher does not argue that his 2011 conviction for possession with intent to deliver heroin is not a violent felony or that his two prior convictions in 2010 and 2011 do not involve separate occasions or incidents. Rather, Butcher argues that because the offense of possession of a controlled substance within 300 feet of a park had been removed from the list of violent felonies in 11 *Del. C.* § 4201(c), at the time he committed the offense of PFBPP in 2015, he only had one prior violent felony for sentencing enhancement purposes under 11 *Del. C.* § 1448(e)(1). Butcher asserts that only those violent felonies included in 11 *Del. C.* § 4201(c) at

the time he committed the new weapons offense were available as predicate offenses to enhance his sentence pursuant to 11 *Del. C.* § 1448(e)(1)c.

The Superior Court rejected Butcher's argument that the offense of possession of a controlled substance within 300 feet of a park was not a violent felony. A29. The trial court found that at the time Butcher was sentenced for that charge, it was a violent felony. A30. The court further determined that although that charge has been re-classified going forward, "the status remains as having been convicted of a prior violent felony, and there's nothing in the statute that ... speaks to that issue to definitively and unambiguously say that the prior status changes." A30. Consequently, the Superior Court found that Butcher had two predicate violent felony convictions and sentenced him for PFBPP pursuant to 11 *Del. C.* § 1448(e)(1)c. The Superior Court's interpretation of the requirements of the applicable sentencing provision of 11 *Del. C.* § 1448(e)(1)c is not legally erroneous and must be upheld on appeal.

Title 11, section 1448(e)(1) of the Delaware Code provides that:

> any person who is a prohibited person as described in this section and who knowingly possesses, purchases, owns or controls a firearm or destructive weapon while so prohibited shall receive a minimum sentence of:
>
> . . .
>
> b. Five years at Level V, if the person does so within 10 years of the date of conviction for any violent felony or the date of termination of all periods of incarceration or confinement imposed pursuant to said conviction, whichever is the later date; or

> c. Ten years at Level V, if the person has been convicted on 2 or more separate occasions of any violent felony.

And subsection 1448(e)(3) further provides that:

> Any sentence imposed pursuant to this subsection shall not be subject to the provisions of § 4215 of this title. For the purposes of this subsection, "violent felony" means any felony so designated by § 4201(c) of this title, or any offense set forth under the laws of the United States, any other state or any territory of the United States which is the same as or equivalent to any of the offenses designated as a violent felony by § 4201(c) of this title.

When the language of a statute is unambiguous, there is no need for statutory interpretation, and the plain meaning of the words of the statute controls.[4] "A statute is ambiguous if 'it is reasonably susceptible of different conclusions or interpretations' or 'if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.'"[5] As pointed out by the prosecutor at Butcher's sentencing (A21), there is no ambiguity in the enhanced sentencing provision of 11 *Del. C.* § 1448 (e)(l)c. This Court has also previously

[4] *See Levan v. Independence Mall, Inc*., 940 A.2d 929, 932-33 (Del. 2007); *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000); *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989).

[5] *Levan*, 940 A.2d at 933 (quoting *Newtowne Village Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 175 (Del. 2001).

found that the statute is unambiguous.[6] There is also no ambiguity in 11 *Del. C.* § 4201(c). Thus, the plain meaning rule of statutory construction applies here.

Butcher had a violent felony conviction in 2010, when Superior Court found him guilty after a stipulated trial of his first violent drug offense. A-22. Butcher had his second violent felony conviction in 2011. Section 1448(e)(l)c uses the phrase "has been convicted ... of any violent felony." Butcher meets this unambiguous statutory requirement, because he was convicted of what was defined as a violent felony when he was convicted of possession of a controlled substance within 300 feet of a park,[7] and subsequently convicted of another violent felony - possession with intent to deliver heroin.[8] The Superior Court properly sentenced him to the applicable ten-year minimum enhanced penalty set forth in section 1448 for those felons convicted of PFBPP with two previous convictions for any violent felonies.

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[6] *Ross v. State*, 990 A.2d 424, 431 (Del. 2010) ("Section 1448(e) is unambiguous, and a literal interpretation of that statute does not yield unreasonable results that were not intended by the legislature.").

[7] *See* former 16 *Del. C.* § 4768. On April 20, 2011, H.B. 19 (known as the "Ned Carpenter Act"), of the 146th General Assembly was signed. The bill repealed the existing drug laws and implemented new ones. The repeal went into effect on September 1, 2011. *See* A55-68.

[8] *See* former 16 *Del. C.* § 4751, also repealed on April 20, 2011, by H.B. 19; *see supra* n.7.

At the time Butcher was convicted of possession of a controlled substance within 300 feet of a park, the crime was designated a "violent felony" pursuant to 11 *Del. C.* § 4201(c). Subsequently, on September 1, 2011, when "4768 Distribution, Delivery, or Possession of a Controlled Substance within 300 Feet of a Park or Recreation Center" was repealed, the offense was also removed from the codified list of current "violent felonies," in section 11 *Del. C.* § 4201(c), while possession with intent to deliver remained on the list. *See* A56.

That the General Assembly left certain prior felonies on the list, while not including others, does not change the equation. Possession within 300 feet of a park and within 1000 feet of a school were removed as freestanding offenses under the revamping of the drug laws; but those offenses were included as aggravating factors for both possession and distribution of controlled substances. The equivalent new drug offenses are included in section 4201(c).[9] In other words, the offenses as such were prospectively eliminated, and they were removed from the listing in section 4201(c) – they were not re-classified. Thus, the change in law did not make those prior offenses noncriminal or nonviolent conduct; the law simply transformed those offenses into aggravating factors used to enhance punishment in

[9] *See, e.g.*, 11 *Del. C.* § 4201(c) (2016) (listing 16 *Del. C.* § 4753 (Drug Dealing – Aggravated Possession; Class C Felony)).

a variety of separate drug offenses. This is a reasonable interpretation of the unambiguous language of the statute.

Even if this Court were to find any ambiguity in the language of section 4201, the legislative intent does not support retroactive application. The general savings statute is applicable here, as the amendment does not provide for retroactive re-classification of the repealed statute.[10] Butcher is not entitled to any benefit conferred by the amended statute because the effective date of the amendment was subsequent to the date of the violent felony of which he was found guilty. Moreover, because plea bargaining and sentences have been effectuated based on the law at the time of the offense, re-classification of prior violent felonies would undo the intent of plea offers and potentially require re-litigation of multiple cases.[11]

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[10] *See* 11 *Del. C.* § 211.

[11] *See State v. Jones*, 2004 WL 838605, at *1 (Del. Super. Ct. Apr. 15, 2004) *aff'd*, 2004 WL 2291310 (Del. Oct. 7, 2004), ("Both the State and defendants negotiated their plea agreements with the then existing sentence scheme in mind. Presumably, the State made concessions based, in part, on the law it assumed would control. Essentially, '[j]ust as the State will not surprise a defendant with greater punishment in an *ex post facto* fashion, neither should a defendant feign surprise about the penalties that accompanied his conduct at the time of offense.'") (quoting *State v. Ismaaeel*, 840 A.2d 644, 655 (Del. Super. Ct.), *aff'd*, 854 A.2d 1158 (Del. 2004)). *See also Morales v. State*, 2004 WL 2291309, at *1 (Del. Oct. 7, 2004); *Stewart v. State*, 2004 WL 2291304, at *1 (Del. Oct. 5, 2004).

The legislature did not provide specifically and unambiguously for the retroactive application of the amendment to section 4201(c), "and a law will not be construed as retroactive unless the Act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application."[12] Here, Butcher "*has been convicted* on 2 or more separate occasions of any violent felony" (emphasis added), and the court properly sentenced him pursuant to 11 *Del. C.* § 1448(e)(1)(c). Moreover, this Court has previously held that the statute is unambiguous.[13] When Butcher was convicted of both his prior PWITD and possession of a controlled substance within 300 feet of a park, both of those offenses were classified as violent felonies pursuant to 11 *Del. C.* § 4201(c). Therefore, Butcher *has been convicted* on two separate occasions of violent felonies.[14] That those statutes were subsequently amended when the new drug

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[12] *State v. Nixon*, 46 A.2d 874 (Del. 1946) (internal quotations and citations omitted). *Accord State v. Jones*, 2004 WL 838605, at *1 (Del. Super. Apr. 15, 2004). *See also Morales v. State*, 2004 WL 2291309, at *1 (Del. Oct. 7, 2004); *Stewart v. State*, 2004 WL 2291304, at *1 (Del. Oct. 5, 2004).

[13] *Ross*, 990 A.2d at 429 (setting forth the statutory construction principles in analyzing 11 *Del. C.* § 1448(e)(1)(c) as compared to those applied to the 11 *Del. C.* § 4214 Habitual Offender statute as it relates to the phrase "convicted on 2 or more separate occasions").

[14] *See id.* ("Ross had been twice convicted of a violent felony by virtue of his two respective guilty pleas .... Therefore, Ross came within the unambiguous terms of the statutory language. Accordingly, the Superior Court was required to apply the statute as written, unless a literal application of the statute would lead to an unreasonable result that could not have been intended by the legislature.").

laws were enacted is of no consequence given that 11 *Del. C.* § 211, the general savings clause of the criminal code, holds that those convictions remain undisturbed because the amending legislation is silent on that point.

In *State v. Ismaaeel*, the Superior Court applied 11 *Del. C.* § 211, the general savings clause, in considering whether the amendments to the drug laws enacted in 2003 had retroactive effect, because the legislation was silent on that point. The court noted:

> Analytically, a "new" statute comes into play whether a law is specifically repealed or an existing statute is modified. [] The General Assembly provided for repeals and amendments in 11 *Del. C.* § 211(a), (b). The Legislature thereby recognized the longstanding federal experience that treated repeals and amendments alike when enacting the Delaware general savings statute. Therefore, both subsections should be read together to produce a harmonious result.[15]

The savings clause should be applied to the designation of violent felonies for the same reason.

The Superior Court has previously addressed similar sentencing issues. In *State v. Trawick*,[16] the defendant pleaded guilty to one count of possession of a deadly weapon by a person prohibited (PDWBPP) in September of 2012. The court sentenced the defendant as an habitual offender and, more importantly, his PDWBPP was treated as a violent felony due to the nature of the defendant's

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[15] *Ismaaeel*, 840 A.2d at 649 (citation omitted).

[16] 2014 WL 5741005, at *2 (Del. Super. Ct. Oct. 27, 2014 (*amended* Jan. 4, 2016)).

underlying prior offenses. In May of 2011, the defendant had been convicted of possession of a controlled substance within 300 feet of a park (16 *Del. C.* § 4768). The State argued that, though the underlying statute had been repealed, that conviction remained a violent felony conviction. The Superior Court agreed, and held that

> PDWBPP was properly considered a violent felony because Defendant's 2011 charge of Possession of a Controlled Substance Within 300 Feet of a Park, contrary to Defendant's position, is indeed a violent felony. Though the statute creating the possession charge for which Defendant was convicted was repealed in September of 2011, Defendant was convicted prior to the repeal of the statute. In sum, pursuant to 11 *Del. C.* § 211 [Repeal of Statutes as Affecting Existing Liabilities], the repeal of § 4768 several months after Defendant's convictions leaves Defendant's conviction undisturbed.[17]

Similarly, in *State v. Weeks*,[18] the defendant pleaded guilty in 2014 to PFBPP and admitted that he was an habitual offender, but denied that any of his predicate felonies were designated as "violent felonies." His record included convictions for possession of a controlled substance within 1000 feet of a school, possession of a controlled substance within 300 feet of a park, and maintaining a dwelling for keeping controlled substances. The defendant's position was that his predicate offenses were not enumerated violent felonies under the current 11 *Del.*

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[17] *Id*.

[18] *State v. Weeks*, 2014 WL 10895228, at *1 (Del. Super. Ct. Aug. 25, 2014), *aff'd*, 2015 WL 5096045 (Del. Aug. 27, 2015).

C. § 4201(c), and, therefore, they could not serve as sentencing enhancers for his current charge. The Superior Court, relying upon this Court's decision in *French v. State*,[19] rejected the defendant's argument and sentenced the defendant in accordance with his prior violent felonies.[20]

In *French v. State*, this Court held that, under the habitual offender statute, after a person has been convicted of a violent felony, that person becomes a "violent felon" for purposes of all subsequent criminal conduct.[21] Specifically, the Court stated:

> [T]he dictionary definition of "felon," not surprisingly, is "[a] person who has been convicted of a felony." It follows that a "violent felon" is a person who has been convicted of a violent felony. There is nothing in the definition of "violent felon" to suggest that one can switch back and forth between being a violent and non-violent felon. The statute identifies a class of people who are violent felons because of their past conduct.[22]

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[19] 38 A.3d 289, 292 (Del. 2012).

[20] *Weeks*, 2014 WL 10895228, at *1.

[21] *French*, 38 A.3d at 292.

[22] *Id.* (internal citations omitted). *See generally Sommers v. State*, 2010 WL 5342953, at *1-2 (Del. Dec. 20, 2010) (holding that the corollary is also true). "As to § 1448(e)(1)(c), the phrase having 'been convicted on 2 or more separate occasions of a violent felony,' can also mean that a defendant's prior Vehicular Assault in the First Degree conviction at a time when it was not defined as a 'violent' felony because it occurred prior to the 1996 enactment of such a statutory designation, nevertheless satisfied the unambiguous language of the statute; it constituted a prior violent felony. *See* 138th G.A., Chapter 577, H.B. 507, approved as amended on July 10, 1996, and codifying 11 *Del. C.* 4201(c) (list of 'violent felonies')." *Id.*

Therefore, it follows, that the "violent felon" designation also remains for the purposes of sentencing enhancers that rely upon violent predicate felonies.[23]

[23] *Cf. State v. Robinson*, 251 A.2d 552, 556 (Del. 1969) ("It is the generally prevailing rule that the pardon of a conviction does not preclude the conviction from being considered as a prior offense under a statute increasing the punishment for a subsequent offense.").

II. MAINTAINING THE STATUS OF BUTCHER'S CONVICTION FOR A VIOLENT FELONY DID NOT VIOLATE HIS DUE PROCESS RIGHTS.

Question Presented

Whether maintaining the "violent" designation for Butcher's prior felony conviction for possession of a controlled substance within 300 feet of a park deprived Butcher of his due process rights.

Standard and Scope of Review

This Court reviews constitutional questions *de novo*.[24] However, this Court reviews arguments presented for the first time on appeal for plain error.[25]

Merits

Butcher argues that the use of his prior violent felony to enhance his sentence for his recent conviction for PFBPP "presents a brand new species of unconstitutionality."[26] Butcher seeks Due Process protections under article I, section 7, of the Delaware Constitution. Butcher asserts that if 11 *Del. C.* § 211(a) is applicable here, that application of the savings clause is unconstitutional as

[24] *See Sheehan v. Oblates of St. Frances de Sales*, 15 A.3d 1247, 1256 (Del. 2011).

[25] Del. Supr. Ct. R. 8.

[26] *Op. Brf.* at 34.

applied to him.[27] Butcher complains that he did not have fair notice that his prior violent felony would be used to enhance his sentence under 11 *Del. C.* § 1448.

Butcher knew in 2010 that he was convicted of a violent felony when he failed to complete the diversion program and the Superior Court found him guilty of possession of cocaine within 300 feet of a park. Butcher knew he was prohibited from legally possessing a firearm after that felony conviction.[28] Butcher also knew that he had a second violent felony conviction after he pleaded guilty to possession with intent to deliver heroin in 2011. When Butcher chose to illegally possess a firearm in 2015, he was aware that he was a person prohibited from possessing a firearm and that he had previously been convicted of two violent felonies.[29]

Butcher seeks relief under the Delaware Constitution, arguing that "the statutory law must give way to the constitutional due process right of fair

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[27] *Id.* at 35.

[28] *See* 11 *Del. C.* § 1448(a)(1) (2010).

[29] *See French v. State*, 38 A.3d 289, 292 (Del. 2012) ("a 'violent felon' is a person who has been convicted of a violent felony. There is nothing in the definition of 'violent felon' to suggest that one can switch back and forth between being a violent and non-violent felon. The statute identifies a class of people who are violent felons because of their past conduct. Thus, after a person has been convicted of a violent felony, that person becomes a 'violent felon' for purposes of all subsequent criminal conduct.").

warning."[30] But, Butcher did have fair warning that he was subject to enhanced sentencing due to his prior violent felony convictions in the plain language of section 1448(e)(1) ("shall receive a minimum sentence of: ... c. Ten years at Level V, if the person has been convicted on 2 or more separate occasions of any violent felony") and this Court's holding in *French v. State* ("after a person has been convicted of a violent felony, that person becomes a 'violent felon' for purposes of all subsequent criminal conduct."). Butcher had fair notice.

[30] *Op. Brf.* at 35.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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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 New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4,168 words, which were counted by Microsoft Word 2016.

Dated: February 10, 2017 /s/Elizabeth R. McFarlan