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Case Number 250,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONTA VICKERS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 250, 2017
	)	
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: September 12, 2017

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NATURE AND STAGE OF THE PROCEEDINGS

Police arrested Donta E. Vickers ("Vickers") on August 15, 2013, and, on October 21, 2013, a Sussex County grand jury charged him with: Assault in the First Degree; Attempted Robbery in the First Degree; Home Invasion, Conspiracy in the Second Degree; three counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"); and Possession of a Firearm by a Person Prohibited ("PFBPP"). (Super. Ct. Docket Item ("DI") 3. (B1). On January 17, 2014, the Superior Court granted Vickers' motion to sever the PFBPP charge into the "B" case. (DI 15; B2). The court dismissed the "B" case on March 10, 2014, the day before it was set for trial. (DI 22-23; B2-3).

On May 5, 2014, in the midst of Vickers' first trial, the Superior Court granted a mistrial, without prejudice, to allow Vickers to explore potentially exculpatory evidence that came to light during trial. (DI 42, 43; B4, 24-25).

On June 10, 2014, the jury found Vickers guilty of Assault in the Second Degree (as a lesser-included offense), and guilty as charged on the remaining counts of the amended Indictment. (DI 60, 66; B6). The court ordered a pre-sentence investigation. (DI 66; B6). On August 8, 2014, after notice and correspondence between the parties, the State moved to sentence Vickers as an habitual offender, and the Superior Court granted the motion. (DI 75, 77; B7, 58). The Superior Court sentenced Vickers to five life sentences plus twelve years at

Level V. (DI 76; B7, 63-65). The sentencing judge found the aggravating factors of Vickers' "repeated disregard for Court order, prior violent conduct, repetitive criminal history, and [that he] lacks amenability to lesser sanctions." Sent. Trans. at 6-7. (B63).

Vickers appealed, alleging that the Superior Court erred in sentencing him as an habitual offender where one of his predicate felony convictions occurred when he was a juvenile.[1] On June 11, 2015, this Court affirmed the Superior Court's judgment and sentences on appeal.[2]

On October 13, 2015, Vickers filed a motion for post-conviction relief. (DI 102; B9, 66-71). The Superior Court appointed counsel to represent Vickers, and Vickers' appointed counsel filed an amended motion on December 14, 2016. (DI 104, 115; B10-11, 72-114). Vickers' trial counsel filed an affidavit responding to his claims, and the prosecutor filed an answer. (DI 118, 102; B11, 115-28). Vickers replied. (DI 121; B12, 129-33). On May 18, 2017, the Superior Court denied Vickers' motion.[3] Vickers appealed.

Vickers filed his Opening Brief on August 10, 2017. This is the State's Answering Brief.

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[1] *Vickers v. State*, 117 A.3d 516, 516 (Del. June 11, 2015).

[2] *Id.*

[3] *State v. Vickers*, 2017 WL 2265104 (Del. Super. May 18, 2017).

SUMMARY OF ARGUMENT

Arguments I-III. DENIED. Vickers failed to prove that any of his three claims of ineffective assistance of trial counsel. First, trial counsel did not err by not filing a motion to suppress an unduly suggestive identification. The victim knew Vickers before the robbery and shooting, and told police where to find Vickers when they arrived; therefore, the subsequent, almost immediate "show-up" identification at Vickers' nearby residence was not unduly suggestive. Second, trial counsel did not err in agreeing with the prosecutor that neither party would admit the gunshot residue report. The report, which did not rule out Vickers as the shooter, would not have advanced Vickers' defense (that he held the gun soon after the shooting but did not fire it). Third, Vickers has failed to prove that trial counsel erred in failing to further investigate the credibility of one of the testifying officers. Vickers' claim is based on speculation—despite having ample time to prepare this motion, Vickers has not investigated and substantiated any credibility issues to affirmatively prove prejudice. More importantly however, the officer's credibility was not an issue in this trial. The Superior Court did not abuse its discretion in denying Vickers' post-conviction motion.

STATEMENT OF FACTS

On direct appeal, this Court summarized the facts as follows:

The victim of the crimes (the "robbery victim") rented a room in a house on Kimmey Street in Georgetown, Delaware. Around 10:30 p.m. on August 15, 2013, the robbery victim received a telephone call from Lenetta Long, who the robbery victim knew to be a prostitute using the name "Black Nada." He invited her over, and sometime after midnight, after locking the front door of the house and his room door, the two had sex in the bedroom, but were interrupted when Long answered a call on her cell phone. The robbery victim spoke limited English and did not understand what was said during the call. After the call Long got up, said she had to use the bathroom, and left the bedroom. When she returned, the robbery victim locked the bedroom door and they resumed having sex.

A few minutes later, someone broke down the bedroom door and Vickers entered the bedroom and pointed a gun at the robbery victim, demanding money. Vickers had covered his face and head with a black cloth, but Vickers' face could still be seen by the robbery victim in the bedroom light. As the robbery victim testified, he could see "his face and his lips and everything."

Vickers also had distinctively large eyes, so the robbery victim recognized him right away as a former co-worker and Georgetown resident. The robbery victim saw a second man hiding outside the bedroom, but did not see the man's face. He identified both men as "black American" and dressed in black. The robbery victim described Vickers as "five-ten and skinny" and the other man as "big and strong."

The robbery victim told Vickers there was money in his pants, and begged Vickers not to shoot him. Vickers put the gun to the robbery victim's head, took his pants and then looked at Long, who gestured towards a piggy bank. Vickers then shot the robbery victim in the right leg, just above the knee, took the pants and piggy bank, and left the house with Long. The robbery victim had about $500 in his pants and about $60 in the piggy bank. He wrapped his leg with a towel to staunch the bleeding, left the house, and saw three people

running towards the Perdue plant on Savannah Drive, where the robbery victim knew Vickers lived in a house owned by Long's mother. Long lived in the same house.

The robbery victim called 911 and the police arrived. He told the police that he knew the shooter and where he lived. The police drove him to the house on Savannah Drive where the robbery victim identified Vickers as the shooter. The police took Vickers into custody and recorded a statement from Vickers where he conceded that he likely had gunshot residue on his hands; he was at the crime scene; he held the gun that shot the robbery victim; but according to his story, the actual shooter handed the gun to Vickers after the shooting so Vickers could feel how hot the gun was. The robbery victim suffered a permanent injury as a result of the gunshot wound to his leg.[4]

[4] *Vickers v. State*, 117 A.3d 516, 516–18 (Del. 2015).

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING POST-CONVICTION RELIEF.[5]

Questions Presented

Whether the Superior Court abused its discretion in denying Vickers' post-conviction motion where Vickers fails to establish error or prejudice.

Scope and Standard of Review

The standard and scope of review on appeal of the denial of a motion for post-conviction relief is abuse of discretion.[6] "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances," [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."[7] Claims not raised below are reviewed only in the interests of justice.[8]

Argument

Vickers raises the same three claims he raised below, arguing that his trial counsel was ineffective for failing to: (1) challenge the "show up" identification of Vickers by the victim; (2) present gunshot residue ("GSR") test results as exculpatory evidence; and (3) attack Officer Cordrey's credibility on cross-

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[5] This argument responds to Arguments I-III in the Opening Brief.

[6] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996); *Shockley v. State*, 565 A.2d 1373, 1377 (Del. 1989).

[7] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

[8] Supr. Ct. R. 8.

examination. The Superior Court's denial of these claims should be affirmed because: (1) the victim knew Vickers, identified him to police and told them where Vickers lived, so the "show up" did not impact the victim's identification: (2) the GSR results would not have been exculpatory where some particles comprising GSR were found on Vickers (but not all three particles) and Vickers admitted he was at the home and held the gun; and (3) the nature of the evidence involving Officer Cordrey (the admission of two "doo rags" purported to be the defendant's, found after defendant was arrested at the residence, and the videotaped interview) did not depend on Cordrey's credibility, the trial judge determined nothing in the personnel file was *Brady* evidence, and despite having had time to pursue this issue in post-conviction, Vickers has pointed to nothing specific and provided no evidence of a credibility issue. Vickers' claims have no merit.

A. Procedural Bars

When considering a motion under Superior Court Criminal Rule 61, the court must consider the procedural rules before reaching the merits of the claim.[9] Vickers' convictions became final in June 2015, when this Court issued its

[9] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

mandate.[10] (DI 100; B9). Vickers filed a *pro se* motion for post-conviction relief on October 13, 2015, less than one year after this Court's mandate. (DI 102; A9). As such, the Rule 61(i)(1) and (2) bars against untimely and successive motions do not apply. All of Vickers' claims allege ineffective assistance of counsel. Because ineffectiveness claims generally cannot be raised on direct appeal, these claims are not procedurally defaulted under Rule 61(i)(3).[11] Finally, Vickers' claims are not barred by Rule 61(i)(4), because they have not been formerly adjudicated.

B. Merits of the Claims

In order to establish that he received constitutionally ineffective assistance of counsel, Vickers was required to demonstrate that: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there exists a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the trial would have been different.[12] Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[13] Courts presume that counsel's conduct fell within a wide range of reasonable professional assistance and constituted

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[10] Super. Ct. Crim. R. 61(m)(2).

[11] *See Duross v. State*, 494 A.2d 1265, 1266 (Del. 1985).

[12] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[13] *Id.* at 693.

sound trial strategy.[14] In evaluating an attorney's performance, a reviewing court should "eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time."[15]

Further, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment."[16] To establish prejudice, the defendant must show a reasonable probability of a different result but for trial counsel's alleged errors.[17] "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."[18] "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding."[19] The defendant must identify the particular defects in counsel's performance and specifically allege prejudice (and substantiate the allegation).[20] Because ineffective assistance of counsel claims "can function as a way to escape

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[14] *Id.* at 689.

[15] *Id.*

[16] *Id.* at 691.

[17] *Id.* at 694.

[18] *Id.* at 693.

[19] *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 693).

[20] *Strickland*, 466 U.S. at 690.

rules of waiver and forfeiture, ... the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve."[21] "The object of an ineffectiveness claim is not to grade counsel's performance."[22]

Vickers' claims fail because he failed to *both* establish that counsel's representation was objectively unreasonable, *and* articulate "concrete allegations of actual prejudice" caused by counsel's deficient performance. The Superior Court thus did not abuse its discretion by denying Vickers' claims of ineffective assistance of counsel.

1. The victim knew Vickers before the "show up."

Vickers argues that the "show up" identification was "unreliable and caused him prejudice," and that "Vickers is not convicted without the identification." Op. Br. at 13. Vickers focuses his argument on cases where the perpetrator was a stranger to the victim, and argues that eyewitness testimony is generally unreliable. Op. Br. at 11-12. Vickers' arguments, however, ignore the fact that, in this case, the victim identified Vickers because he knew him before the shooting, not as a result of the "show up." Vickers argues that this makes the "show up" "all the more susceptible to undue influence," Op. Br. at 14, but does not explain how.

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[21] *Richter*, 562 U.S. at 105 (citing *Strickland*, 466 U.S. at 689-90).

[22] *Strickland*, 466 U.S. at 697.

Vickers also argues that "[t]he identification is further complicated by the victim's inability to speak English," Op. Br. at 14, but does not explain why. Finally, Vickers focuses on the lack of other evidence presented at trial, Op. Br. at 12-13, however, the victim knew the perpetrator, and the perpetrator admitted to participating in the robbery, but claimed that he was not the shooter—the prosecutor had ample evidence to establish proof beyond a reasonable doubt.

"'[A]bsent unnecessary and unfair police suggestion, prompt on-the-scene confrontations, per se, are not so unnecessarily suggestive as to constitute violations of due process rights.'"[23] The victim testified as follows:

> Q: Did you recognize the man with the gun?
> V: . . . Yes, I recognize him because he used to work with me in sanitation at the island. . . .
> Q: Other than work, did you see him around town?
> V: . . . Yes, I will see him around in a car, in a Galant, a type of Mitsubishi. I would see him around Georgetown.
> Q: And did you know his name?
> V: . . . No, I never knew his real name.
> Q: Did you know where he lived?
> V: . . . Yes, I have seen him at the house. . . .
> Q: Do you know who owned the house that the man with the gun lived at?
> V: . . . Yes, I heard that it was [the prostitute's] mom, the owner of the house.

(B47-48). On cross-examination, the victim stated that he "recognized [Vickers] right away because big eyes." (B55-56). The victim told police, which led to the

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[23] *Vickers v. State*, 1999 WL 89276, at *2 (Del. Jan. 8, 1999) (quoting *Watson v. State*, 349 A.2d 738, 740 (Del. 1975)).

show up:

> Q: When the police arrived, did you tell them that you knew the man who shot you?
> A: . . . Yes.
> Q: Did you tell them where that man lived?
> A: . . . Yes, I told them where he lived. Yes.
> Q: On the way to the hospital, were you taken to that man's house?
> A: . . . Yes, they took me. I told them it was on the way to Perdue, and so they took me and they had him on the balcony. And I told them that the one that was smoking is the one who shot me.
> Q: The man you identified, was he handcuffed?
> A: . . . No, he was not handcuffed. He was sitting. And I was asked which one, and I said the one with the big eyes.
> Q: And was that the same person that you've identified in court today?
> A: . . . Yes.

(B52-53). Vickers' trial counsel explained that, given the facts of the case, he "concluded that a motion to suppress the identification would have no merit." Aff., ¶¶ 5-8. (B115-16). The Superior Court correctly found:

> [T]here is a two-part inquiry: (1) whether the confrontation was unnecessarily suggestive; and (2) did a substantial likelihood of misidentification exist. . . .
>
> In this case, the victim told the police he knew the Defendant. The victim had worked with the Defendant. The Defendant has distinctive large eyes (so-called "bug eyes") and is easily recognizable. The victim knew where the Defendant lived, which was not far from the victim's residence. The victim knew that the Defendant and the prostitute who "set up" the home invasion resided in the same boarding house. As a result of this information, which the victim provided to the investigating officers, the police diverted the ambulance to the Defendant's house for the show-up identification. Even assuming *arguendo* that the identification was impermissibly suggestive, the Defendant has not shown there was a substantial likelihood of misidentification. The Defendant was not a stranger to

> the victim. The victim knew the Defendant and told the police where they could find him. There was no danger of misidentification at trial because the Defendant admitted being at the scene.
>
> Moreover, trial counsel aggressively challenged the victim's identification as not credible at trial. . . .
>
> Under the circumstances, I find trial counsel was not ineffective for failing to file a motion to suppress the show up identification.[24]

The Superior Court's holding is correct and well-supported by the record.[25] Vickers' claim has no merit.

2. The gunshot residue report was not exculpatory.

Vickers argues that his trial counsel was ineffective for failing to submit into evidence a gunshot residue report. Vickers' claim fails because the report is not exculpatory. Vickers' trial counsel explained that Vickers told him not to have the GSR swabs tested, and when the prosecutor elected to do so:

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[24] *State v. Vickers*, 2017 WL 2265104, at *2–3 (Del. Super. May 18, 2017) (citing *Richardson v. State*, 673 A.2d 144, 147 (Del. 1996)).

[25] *See Government of the Virgin Islands v. Garcia*, 232 Fed. Appx. 167, 169 (3rd. Cir. 2007) (finding "show up" reliable where defendant "lived next door to the victim and she had seen him on numerous occasions. She had ample opportunity to observe him during the perpetration of the crimes and provided police with a detailed and accurate description of him and his clothing prior to the 'show up.' The 'show up' identification occurred just minutes after the crimes and was instantaneous and unequivocal."); *Vickers v. State*, 1999 WL 89276, at *2 (agreeing with the Superior Court "that the show-up conducted by the police, within minutes after the offense, was not unnecessarily suggestive nor likely to create a substantial likelihood of misidentification.").

> The results came back showing the presence of some of the three component particles as individual particles (lead, barium or antimony) associated with gunshot residue, but not particles containing all three.
>
> The evidence, in [trial counsel's] opinion, could have been argued either way. The evidence would have been stronger for the State if there had been gunshot residue found (all three elements combined). The evidence would have been stronger for the Defense had there been no component parts found on Defendant's hands.
>
> The Defendant made a statement to police [that was played for the jury] that he was present at the time of the robbery. He said he did not pull the trigger but admitted that he handled the gun moments after the shooting. He also said that he thought there would be gunshot residue on his hands because he handled the gun after the shot was fired.

Affidavit, ¶¶ 9-12. In addition, as the prosecutor noted, "the very last line of the GSR report states: 'The absence of GSR does not eliminate the possibility that the subject handled or discharged a firearm." State's Response, at 6, n.5. (B124). The Superior Court found that, with Vickers' admission that he was there, held the gun after the shooting, and that he would have GSR on him, it was "sound trial strategy" not to introduce the GSR report, as it may have given the prosecutor incentive to proceed under an accomplice liability theory in addition to, or in the alternative to, the theory that Vickers was the shooter.[26]

Given his admissions and the fact that the GSR report is at best equivocal,

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[26] *State v. Vickers*, 2017 WL 2265104, at *3 (footnote omitted). It appears that the prosecutor did not pursue accomplice liability theory because she had not at the first trial, which occurred prior to the GSR testing. (B46).

trial counsel made a reasonable strategic decision. As the Supreme Court held in *Strickland*:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[27]

Vickers has failed to show that trial counsel's decision was unreasonable or that his performance was otherwise deficient, and he has also failed to establish any prejudice that resulted from trial counsel's decision not to introduce a report that was inconclusive. The Superior Court was correct and did not abuse its discretion when it found this claim had no merit.

3. Vickers has not shown that Detective Cordrey lacked credibility or, if he did, how it prejudiced him.

Vickers' last argument also fails because he has not proven either deficient performance or resulting prejudice. On appeal, Vickers discusses, at relative length, former Georgetown police officer *Story's* credibility issues, and then summarily states that "there is no evidence that trial counsel looked into the truthfulness issues involving *Cordrey* (as alleged by Story). . . . As the lead investigator, Cordrey's credibility is key to the State's case." Op. Br. at 16-17

[27] *Strickland*, 466 U.S. at 690-91.

(emphasis added). He states that the failure to investigate "potential impeachment evidence . . . against Cordrey" prejudiced Vickers, without showing any prejudice, other than pointing to the State's "lack of evidence." *Id.* at 17. Vickers' conclusory claim has no merit.

The prosecutor summarized the history of this claim as follows:

> This issue came to light just before closing arguments in the first trial, when a former officer with the Georgetown Police Department named Christopher Story (who had resigned from the Department under contentious circumstances and had actually field a lawsuit against the Georgetown Police Department, which was still pending at that time) posted a comment on Facebook disparaging the credibility of Det. Cordrey (without offering any specifics). The court granted a mistrial to give trial counsel time to explore this issue and, in the interim before the second trial began, the State collected a voluminous number of records regarding both Det. Cordrey and Officer Story and provided them to the Court for *in camera* review. At an office conference prior to the second trial, the Court essentially ruled that there was nothing in Det. Cordrey's records that created a question about his credibility.

State's Response, at 7. (B125).[28] Although it came to light that Detective Cordrey had been disciplined for insubordination, Vickers' trial counsel asserted that he saw no way to use the insubordination claim to attack Detective Cordrey's credibility on the facts of this case. Affidavit, ¶ 14. (B117-18). The Superior Court found:

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[28] The Facebook post is included as Exhibit 8 to Vickers' Amended Motion. (B105); Court Ex. 3. The transcript of the discussion leading to the mistrial and the office conference addressing this issue prior to the second trial are included in the State's appendix. (B16-45).

> Trial counsel's Rule 61(g) affidavit succinctly address the reason why Officer Cordrey's history of insubordination was not raised at trial: Any connection between the officer's insubordination and/or credibility was not an issue because the officer's credibility was never an issue at trial. Trial counsel had to navigate the rough waters created by the Defendant's admissions to the police and the victim's identification of the Defendant.
>
> Trial counsel's decision to focus on the theory that the Defendant was not the actual shooter versus the credibility of a testifying officer was reasonable. The Defendant's conclusory claim that a credibility attack on the officer would have successfully dismantled the State's case is without merit. In this Motion, the Defendant has not pointed to any specific testimony of Officer Cordrey that, if discredited, would have potentially made a difference in this trial.
>
> Trial counsel was not ineffective for failing to impeach Officer Cordrey's credibility.[29]

Now, as below, Vickers has not presented any impeachment evidence to establish that trial counsel's alleged lack of investigation was, in fact, error. Further, as the Superior Court found, he has not pointed to material evidence presented at trial that turned on Detective Cordrey's credibility.[30] Finally, Vickers' argument that the State lacked evidence ignores Vickers' admissions that he participated in the crime, and that the victim knew him before the shooting and identified him. Having failed to prove either trial counsel's deficient performance or prejudice, Vickers' last claim fails.

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[29] *State v. Vickers*, 2017 WL 2265104, at *4.

[30] When this issue was addressed before the second trial, the judge noted that "most of his interview with the defendant is videotaped. So if he is embellishing or exaggerating, you have the videotape that is there." Ofc. Conf., at 17. (B44).

Summary

The Superior Court did not abuse its discretion in denying Vickers' motion for post-conviction relief. Vickers has failed to establish error or prejudice resulting from any of his claims, as he robbed and shot someone he knew, who readily identified him.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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DATE: September 12, 2017

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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 Time 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 4,322 words, which were counted by Microsoft Word 2016.

Dated: September 12, 2017

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CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on September 12, 2017, I caused the attached document to be served by File and Serve to:

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