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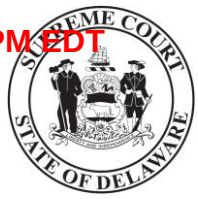


**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| **EVERETT URQUHART,** | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 16, 2018 |
| | ) | |
| **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: April 4, 2018

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## NATURE AND STAGE OF THE PROCEEDINGS

Everett Urquhart ("Urquhart) was arrested on July 18, 2014. Super. Ct. Docket Item ("DI") 1. (A1). On September 2, 2014, a New Castle County Grand Jury returned a five-count Indictment against Urquhart alleging Robbery in the First Degree, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm by a Person Prohibited, Reckless Endangering in the First Degree and Wearing a Disguise During the Commission of a Felony. (DI 2, A1, 10-12). After a three-day jury trial, Urquhart was convicted of all charges. (DI 16; A3). On May 29, 2015, the Superior Court sentenced Urquhart to fifteen years at Level V, followed by decreasing levels of supervision. (A13-16).

Urquhart appealed his judgement and conviction, alleging that the Superior Court erred by admitting evidence of a bystander's description of the getaway car.[1] This Court affirmed on direct appeal, finding that the statement was admissible because it satisfied the excited utterance and present sense impression exceptions to the hearsay rule, and did not violate Urquhart's Sixth Amendment confrontation rights because the statement was not testimonial.[2]

On April 25, 2016, Urquhart filed a *pro se* motion for post-conviction relief, which he supplemented on June 20, 2016, along with a motion for appointment of

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[1] *Urquhart v. State*, 2016 WL 768268, at *2 (Del. Feb. 26, 2016).

[2] *Id.* at *2-3.

counsel. (DI 34, 37, 38; A5-6). The Superior Court granted his motion for appointment of counsel, and counsel filed an amended motion for post-conviction relief on July 11, 2017. (DI 52-53, A8, 48-79). Trial counsel filed an affidavit responding to the motion on September 7, 2017. (A81-83). The State filed its response on November 14, 2017. (A84-96).

On December 7, 2017, the Superior Court denied Urquhart's amended motion for post-conviction relief. Urquhart has appealed and filed his Opening Brief. This is the State's Answering Brief.

## SUMMARY OF ARGUMENT

**Argument I. DENIED**. The Superior Court did not abuse its discretion in denying Urquhart's post-conviction motion. Urquhart waived his claim that counsel was ineffective at the pretrial stage when he went forward with counsel at trial, despite the court's offer for a continuance. The Superior Court correctly determined that *Cronic* did not apply to Urquhart's claim, and denied him post-conviction relief. Urquhart has waived any claim that counsel's pretrial performance caused him prejudice by failing to raise that claim on appeal.

## STATEMENT OF FACTS

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

On July 15, 2014, a masked man wearing a black North Face coat and ski mask walked into the Lesly Grocery, a corner store in Wilmington. He approached the cashier and pulled out a gun. The robber demanded that the cashier hand over the money in the register and fired the gun near him. A security camera documented the robbery. Another camera captured a dark-colored Chrysler 300 driving by the store seventy six seconds before the robbery.

Wilmington Police Corporal Paul Demarco was on duty that day in the vicinity of the crime scene. A construction crew flagger approached Corporal Demarco and told him that someone was shooting inside the Lesly Grocery. After briefly checking on the welfare of the store occupants, Corporal Demarco walked up the street and encountered an unidentified woman. She appeared calm, but was whispering quietly as if she did not want to be seen speaking to police. The woman told Corporal Demarco that she saw someone flee the area and get into a green, four-door sedan. She also gave him its license plate number. Less than two minutes passed between the time Corporal Demarco radioed that he was responding to the call and the time he radioed the license plate number.

DMV records showed that Caree Matsen owned a green Chrysler 300 bearing the license plate number that the woman provided. Matsen testified that she had loaned her car to her sister's boyfriend, Everett Urquhart. Police searched Matsen's residence and found Urquhart's belongings in Matsen's sister's bedroom. Police also found several pictures of Urquhart wearing a black North Face jacket with a hood. Urquhart was arrested and charged with robbery.[3]

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[3] *Urquhart v. State*, 2016 WL 768268, at *1.

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

### Questions Presented

Whether Urquhart waived his claim by electing to go to trial. Whether the Superior Court erred in finding that Urquhart must establish prejudice to be successful in his claim of ineffective assistance of counsel.

### 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.[4] "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."[5]

### Argument

Urquhart raises only one claim on appeal—that the Superior Court abused its discretion in finding that he is required to establish prejudice resulting from his trial counsel's pretrial performance, rather than having prejudice presumed under *United States v. Cronic*.[6] Urquhart's claim is unavailing. Urquhart waived any objections to counsel's pretrial performance when he declined a continuance and

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

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

[6] 466 U.S. 648 (1984).

stated he wished to go to trial that day with his trial counsel. In addition, as the Superior Court found, *Cronic* does not apply to Urquhart's case because he was not denied counsel at a critical stage of the proceeding. Urquhart cannot succeed on his ineffective assistance of counsel claim unless he proves under *Strickland* both that his attorney's performance fell below an objective standard of reasonableness and that it prejudiced him.[7] The Superior Court was correct, and its judgment should be affirmed.[8]

In his second claim in Superior Court, Urquhart attempted to establish under *Strickland* that his counsel was ineffective for failing to investigate. The Superior Court found that counsel's performance was not constitutionally deficient and that Urquhart failed to show prejudice. Urquhart has failed to brief this claim on appeal and has therefore waived it.[9]

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

[8] Urquhart mentions the Delaware Constitution, but does not specifically address it. Because he has failed to adequately brief a state constitutional claim, it is waived. *See Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) (citing *Ortiz v. State,* 869 A.2d 285, 291 n. 4 (Del. 2005) ("This Court has held that "conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal.").

[9] *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); Supr. Ct. R. 14(b)(vi)(A)(3).

### 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.[10] Urquhart's convictions became final in March 2016, when this Court issued its mandate.[11] (DI 5; A5). Urquhart filed a first, *pro se* motion for post-conviction relief the next month, on April 25, 2016, well within one year of this Court's mandate. (DI 34; A5). As such, the Rule 61(i)(1) and (2) bars against untimely and successive motions do not apply. Urquhart's claim alleges 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).[12]

### B. Merits

In order to establish that he received constitutionally ineffective assistance of counsel under *Strickland*, a defendant is 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.[13] Mere allegations of

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

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

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

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

ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[14] Courts presume that counsel's conduct fell within a wide range of reasonable professional assistance and constituted sound trial strategy.[15] 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."[16]

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."[17] To establish prejudice, the defendant must show a reasonable probability of a different result but for trial counsel's alleged errors.[18] "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."[19] "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding."[20] The defendant must identify the particular defects in counsel's

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[14] *Id.* at 693.

[15] *Id.* at 689.

[16] *Id.*

[17] *Id.* at 691.

[18] *Id.* at 694.

[19] *Id.* at 693.

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

performance and specifically allege prejudice (and substantiate the allegation).[21] Because ineffective assistance of counsel claims "can function as a way to escape 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."[22] "The object of an ineffectiveness claim is not to grade counsel's performance."[23]

The same day the United States Supreme Court decided *Strickland*, they provided exceptions to *Strickland*'s prejudice requirement in *Cronic*. In *Cronic*, the Supreme Court determined that there were three circumstances "'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'"[24] Those three circumstances exist where: (1) there was a "complete denial of counsel;" (2) counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) "the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of

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693).

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

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

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

[24] *Bell v. Cone*, 535 U.S. 685, 695 (2002) (quoting *Cronic*, 466 U.S. at 658-59).

counsel."[25] "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind."[26]

Urquhart argues prejudice should be presumed because his case falls within the first *Cronic* category, *i.e.,* that he was "denied counsel at a critical stage of the proceeding," the pretrial stage. Op. Br. at 13. Urquhart's argument fails on two fronts: (1) he waived it; and (2) it fails on the merits.

Urquhart affirmatively waived any claim regarding trial counsel's pretrial performance and alleged lack of communication when he declined the Superior Court's offer for a continuance, and determined to go to trial. When the Superior Court addressed him about declining the guilty plea with a cap of five years (A127), and his desire to have the person prohibited charges go forward with the other charges, as one trial (A138), he stated there was unexpected evidence—including photos from a cell phone that was not his own. (A139). At that point, the Superior Court asked him if he was dissatisfied with trial counsel, to which he responded, "I'm not saying—like, I'm not saying I'm dissatisfied." After more questioning by the Superior Court about Urquhart's communication with counsel and their ability to review the evidence, the Court stated, "I take it, frankly, the defendant to be asking me *pro se* for a continuance." (A144). When the Superior

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[25] *Cronic*, 466 U.S. at 659, 666; *Cone*, 535 U.S. at 695.

[26] *Cone*, 535 U.S. at 697.

Court then asked Urquhart directly, "Do you want a delay in your trial so that you can go over this stuff; is that what you are asking me for?" Urquhart responded that he just wanted to know how the evidence would be admissible. The court again asked if he wanted a delay, and he replied "No, sir." (A145).

Urquhart could have obtained a continuance and gone over any evidentiary questions with his attorney, and taken more time to prepare his defense, but he declined. At the same time, Urquhart declined the State's plea offer with a recommendation capped at five-years at Level V incarceration (A127-29), and declined to sever his person prohibited charge despite knowing that the evidence of his past conviction could be highly prejudicial. (A123, 130-34, 147-49). In his affidavit, trial counsel stated that Urquhart made clear that he would not plead guilty, stating, "'I [would] rather do 95 years then take a plea to 5. It['s] all the same to me.'" (A82). Like these other decisions, Urquhart waived his claims about counsel's pretrial performance when he determined to go forward with trial despite the opportunity for more time.[27]

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[27] *See Fowler v. State*, 2016 WL 5853434, at *2 (Del. Sept. 29, 2016) ("During the trial, the judge raised the possibility of severance but neither party expressed an interest in it. Fowler failed to take the Superior Court up on what was in essence an offer to sever the trial. It thus comes with little grace to accuse the Superior Court of plain error when Fowler effectively waived any right to severance."); *Stevenson v. State*, 2016 WL 5937897, at *9 (Del. Oct. 11, 2016) ("As this Court explained in *King v. State*, [239 A.2d 707 (Del. 1968),] there is an express and effective waiver as to any appellate presentation on an issue where defense counsel responds to queries by a trial judge, stating that there are no objections to the

On the merits, Urquhart's claim fails both factually and legally—he uses facts that contradict the Superior Court's findings in an attempt to support his argument that counsel's performance was subpar to an extreme. In doing so, however, he undertakes the type of analysis that *Cronic* is designed to avoid. As the District of Columbia Court of Appeals recently explained, "The *Cronic* inquiry is a largely mechanical one, and we are mindful of avoiding a holding that could open the door to replacing 'case-by-case litigation over prejudice with case-by-case litigation over prejudice *per se*.'"[28]

Contrary to many of the Superior Court's factual findings, which are supported by the record, Urquhart alleges that trial counsel:

> [D]id not attend Mr. Urquhart's arraignment or subsequent case reviews. Nor did Trial counsel file any pretrial motions. The record reflects a total lack of communication and consultation with Mr. Urquhart in preparation for trial. As a result, his Trial Counsel failed to prepare an adequate defense, learn of potential witnesses, or develop a timely strategy.

(Op. Br. at 17). Urquhart had a preliminary hearing, with the assistance of counsel, on August 28, 2014. (A102-19). At that hearing, the State's entire case was outlined for defense counsel, including the fact that a surveillance camera recorded

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admission of evidence. Indeed, such affirmative statements are a stronger demonstration of a waiver 'than the mere absence of an objection.'").

[28] *United States v. Bell*, 795 F.3d 88, 98 (D.C. Cir. 2015) (quoting *Scarpa v. Dubois*, 38 F.3d 1, 14 (1st Cir. 1994)) (finding *Cronic* inapplicable to a mid-trial substitution of counsel).

the robbery. (A116). At the hearing, it was revealed that during the investigation, Urquhart's girlfriend, the sister of the registered owner of the car, denied to police that she knew Urquhart.[29] (Op. Br. at 5; A115). Urquhart's arraignment took place on the same day as his first case review, at which Urquhart had counsel, but no prosecutor appeared. Contrary to Urquhart's implication of multiple case reviews, the only other case review was his final case review, at which time trial counsel's supervisor represented Urquhart. *See* A100. The Superior Court further found unavailing Urquhart's claim that his trial counsel had "no time to interview potential witnesses, discuss possible defense strategies, or prepare Mr. Urquhart to testify (or decide that he should not testify)." (Op. Br. at 18). The Superior Court found:

> Trial Counsel met with Urquhart on August 14, 2014 at Howard R. Young Correctional Institution to review the affidavit of probable cause; by phone on August 27 to discuss a motion to dismiss the indictment; and by phone on November 10 to discuss discovery. In addition, Trial Counsel communicated by letter on five occasions, which included sending Urquhart copies of discovery on September 2 and November 14, 2014, and on January 28, 2015. Then, Trial Counsel and Urquhart met on the morning of trial to go over the discovery and discuss trial strategy.[30]

Urquhart has not contested the Superior Court's fact-finding on appeal, waiving

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[29] She was pictured in photos with Urquhart found on a cell phone in her home, near her paperwork. (A61, 95, 115). Counsel and Urquhart determined that her testimony may be detrimental. (A83).

[30] *State v. Urquhart*, No. 1407012946, Memo. Op. at 9-10, Parkins, J. (Dec. 7, 2017) (Op. Br. Ex. A) (hereinafter, "*State v. Urquhart.*").

the issue.

The Superior Court also was correct on the legal issue. The court found that "[t]he facts of this case do not fall within *Cronic* because . . . Trial Counsel was not completely absent—Counsel did communicate with the defendant leading up to his trial regarding the evidence and defense strategy—and thus, Mr. Urquhart was not completely denied counsel."[31] The first *Cronic* category does not apply unless there was a "'complete denial of counsel'" at a critical stage.[32] "[A] constructive denial of counsel occurs when a criminal defendant must navigate a critical stage of the proceedings against him without the aid of 'an attorney dedicated to the protection of his client's rights under our adversarial system of justice.'"[33]

In *Doe Boy v. United States*, the defendant alleged that the first *Cronic* scenario applied due to his trial "counsel's failure to file any pre-trial motions for discovery and suppression motions, or his failure to subpoena witnesses."[34] The United States District Court declined to apply *Cronic*, finding "that the *Cronic*

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[31] *Id.*, at 10-11. (Op. Br. Ex. A).

[32] *Cone*, 535 U.S. at 695 (quoting *Cronic*, 466 U.S. at 659).

[33] *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997) (quoting *United States v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991)).

[34] *Doe Boy v. United States*, 2006 WL 839336, at *4 (D. Del. March 28, 2006) ("Clemons asserts that the pre-trial period constitutes a 'critical period,' and therefore, prejudice should be presumed because of counsel's overall pre-trial failure to investigate. He also contends that counsel failed to subject the Government's case to meaningful adversarial testing because of the same overall failure to investigate the case.").

presumption of prejudice only applies when counsel has completely failed to test the prosecution's case throughout the entire trial."[35] The District Court determined, *inter alia*, that "counsel already had many discovery items in his possession, therefore obviating any need to file motions to obtain those items," and in addressing the defendant's claims under *Strickland*, that counsel's failure to file a suppression motion was "the result of an analysis of the situation under governing legal principles."[36] Here, Urquhart had a preliminary hearing during which the State laid out its case. Counsel determined that Urquhart had no alibi witnesses, and decided to test the strength of the State's evidence with a misidentification defense. The Superior Court found that counsel was communicating with Urquhart, and found that Urquhart was not prejudiced by the alleged lack of pretrial investigation. As in *Doe Boy*, *Cronic* does not apply to Urquhart.[37]

In *Sullivan v. State*, the United States District Court addressed a similar allegation and came to a like conclusion.[38] Sullivan, who had been sentenced to death, argued, *inter alia*, that his attorney's performance was generally poor, and in

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[35] *Id.* at *4.

[36] *Id.* at *4, *6.

[37] *Sullivan v. State*, 1998 WL 231264, at *21-22 (D. Del. Apr. 30, 1998), *aff'd sub nom. Sullivan v. Snyder*, 187 F.3d 626 (3d Cir. 1999).

[38] *Id.* at *22.

particular that his attorney had failed to investigate the facts and mitigating evidence and failed to follow reasonable strategy.[39] The District Court found that *Strickland*, not *Cronic*, applied, and that this Court did not err in its determination that Sullivan failed to prove prejudice.[40] In so holding, the District Court stated:

> [C]ounsel's alleged errors occurred within the context of an active adversarial representation. Petitioner did receive meaningful representation; at no point did he have to "navigate a critical stage of the proceedings against him without the aid of 'an attorney dedicated to the protection of his client's rights under our adversarial system of justice.'" "[B]ad lawyering, regardless of how bad, does not support the [*Cronic* ] presumption; more is required.'"[41]

The Federal Circuit Courts have consistently made this distinction when faced with a *Cronic* claim.[42]

Urquhart cites no case in which *Cronic* has been applied to similar facts. Urquhart's reliance on this Court's decision in *Harden v. State*, Op. Br. at 16-17, is misplaced. While *Harden* is instructive regarding defense counsel's duties related to plea hearings, this Court applied *Strickland*, not *Cronic*, in finding that counsel's

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[39] *Id.* at *21.

[40] *Id.* at *26.

[41] *Id.* at *22 (quoting *Childress*, 103 F.3d at 1229 (citation omitted) and *McInerney v. Puckett*, 919 F.2d 350, 353 (5th Cir.1990), and citing *Scarpa v. Dubois*, 38 F.3d at 13–15, for the proposition that a "defense attorney's 'maladroit performance,' as distinguished from 'non-performance,' required an inquiry into the existence of actual prejudice under *Strickland*.")).

[42] *See Childress*, 103 F.3d at 1229 (reviewing precedent from other circuits, and noting, "In essence, we have consistently distinguished shoddy representation from no defense at all.")

deficient performance caused prejudice.[43]

Urquhart waived his claim that counsel was ineffective at the pretrial stage when he went forward with counsel at trial. The Superior Court correctly determined that *Cronic* did not apply to Urquhart's claim, and denied him relief. Urquhart has waived any claim that counsel's pretrial performance caused him prejudice. The Superior Court's decision should be affirmed.

[43] *Harden v. State*, 2018 WL 716854, at *10-11 (Del. Feb. 6, 2018) ("To determine whether Harden has shown the necessary prejudice under *Strickland*'s second prong, the question this Court must ask is whether there is a reasonable probability that, had Harden's counsel fulfilled his adversary obligations, Harden would have received a shorter sentence.").

## CONCLUSION

The judgment of the Superior Court should be affirmed.

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DATE: April 4, 2018

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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 3,744 words, which were counted by Microsoft Word 2016.

Dated: April 4, 2018

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