STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP002488-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY L. FINLEY, JR.,

Defendant-Appellant.

On Notice of Appeal From a Judgment of Conviction
and Order Denying Defendant's Postconviction Motion
Entered in Brown County, the Honorable
William M. Atkinson, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Wisconsin Statutes

ISSUE PRESENTED

> Did the state meet its burden of proof that Timothy Finley's plea was knowing and voluntary despite trial counsel's testimony that he had no specific recollection of informing Finley of the correct maximum penalty, and the plea questionnaire and in-court colloquy did not establish Finley knew the correct maximum penalty?

The trial court found the state had met its burden, and denied Finley's postconviction motion to withdraw his guilty plea.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Finley does not request either oral argument or publication.

STATEMENT OF THE CASE

This is the second appeal in this case. In June of 2013, Finley filed a motion for postconviction relief seeking withdrawal of his no contest plea on the ground that his plea was not knowing and voluntary. (63; App. 141-147). He also moved, alternatively, for the court to commute his sentence in light of the supreme court's decision in ***State v. Taylor***, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482. (63:1; App. 141). Finley's motion for plea withdrawal alleged the plea colloquy was deficient in that he was not correctly informed of the applicable maximum penalty at the plea hearing, and he was not otherwise aware of the

maximum penalty. Although the correct maximum penalty he faced was 23.5 years, the plea questionnaire and waiver of rights form stated the maximum prison exposure was 19.5 years. (63:3; App. 143). The court repeated that incorrect prison penalty in its plea colloquy with Finley.[1] (90:4).

The court, the Honorable William M. Atkinson presiding, held a hearing on the postconviction motion. (93). The state argued that Finley had not made a *prima facie* case for plea withdrawal. (93:3-10). The court agreed, and no evidence was presented at the postconviction hearing. (93:13).

Finley appealed, and this court affirmed the judgment but reversed the trial court's denial of his postconviction motion. (100; App. 101-110). The court concluded that Finley had made a *prima facie* showing, and remanded the case so that the state could attempt to prove that Finley's plea was knowing and voluntary despite the deficient colloquy. (100:9-10; App. 109-110).

Judge Atkinson held a hearing pursuant to the remand order, at which Finley's trial counsel, Jason Farris, testified. (93.2).

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[1] Finley pled to first degree reckless endangerment, which is a Class F felony. As such, the maximum imprisonment was 12.5 years, consisting of 7.5 years of initial confinement and 5 years of extended supervision. *See* Wis. Stat. §§ 939.50(3)(f); 973.01(2)(b)6m and (d)(4). The plea also included the dangerous weapon enhancer, adding five years to the initial confinement. *See* Wis. Stat. § 939.63(1)(b). And, the plea included the repeater enhancer of six years to be added to the initial confinement. *See* Wis. Stat. § 939.62(1)(c). Thus, the maximum exposure was 18.5 years of initial confinement, and five years of extended supervision, for a total of 23.5 years.

Following presentation of the evidence, Finley conferred with counsel, and withdrew his argument that as an alternative to plea withdrawal, he wanted the court to commute his sentence to the 19.5 years he had been informed was the maximum penalty. (93.2: 23; App. 133). He maintained his position that he wanted to withdraw his plea. (*Id.*).

The court denied Finley's motion to withdraw his plea, but modified the sentence as Finley had originally requested in his postconviction motion. The court said:

> All right. I'll find that the defendant's entitled to have his sentence modified to no more than the amount that was represented to him by the Court and stated on his Plea Questionnaire and Waiver of Rights Form and that was nineteen years and six months. I think I had imposed eighteen years and six months original and then five years extended supervision.
>
> What I'll do, I guess, just to avoid even further issue on the mathematics then—so that's four years less, so I'll reduce his initial confinement to fourteen years six months, maintain the extended supervision at five years, order the judgment of conviction be amended to reflect the sentence then a total of nineteen years six months comprised of fourteen years six months of extended supervision—correction, fourteen years six months initial confinement, followed by five years of extended supervision.
>
> To the extent that the motion was to then to allow him to withdraw his plea, the motion is denied.

(93.2:23-24; App. 133-34).

The court filed a written decision and order on October 8, 2014, (108) and then an amended decision and

order on October 17, 2014. (109; App. 137-140). In the October 17th decision, the court stated it believed the state had met its burden of proving that "Finley knew the maximum penalty he faced at the time he entered his plea." (109:3; App. 139). However, the court commuted Finley's sentence to 14.5 years of initial confinement and five years of extended supervision "in the interest of justice." (*Id.*). The court relied on Wis. Stat. § 973.13, and ***State v. Taylor***, 2013 WI 34, ¶45, n.13, 347 Wis. 2d 30, 829 N.W.2d 482 to fashion this remedy. (*Id.*).

Finley filed a notice of appeal and again seeks plea withdrawal. (111).

STATEMENT OF FACTS

The state filed a criminal complaint on June 7, 2011, which charged Timothy L. Finley, Jr., with multiple charges arising out of an incident in which he was alleged to have severely beaten and confined his girlfriend, Kara. The charges were first degree reckless endangerment, with a dangerous weapon; substantial battery; strangulation and suffocation; and false imprisonment, all as an act of domestic abuse. (2). On June 27, 2011, the state filed an information which added the repeater enhancer pursuant to Wis. Stat. § 939.62, to each charge. (12).

The case was resolved with a plea agreement one year later. Finley appeared before the Honorable William M. Atkinson on June 25, 2012, and pleaded no contest to one count of first degree reckless endangerment, as a domestic abuse and with a dangerous weapon, as a repeater. (90:5). Finley's attorney tendered a completed plea questionnaire and waiver of rights form to the court. (44; App. 148-49). In the section reserved for the statement of the maximum penalty,

the form reads: "19 years, 6 months confinement and $25,000 fine and court costs." (44:1; App. 148).

The court addressed Finley personally at the plea hearing. Regarding the maximum penalty, the court and Finley had this exchange:

> THE COURT: The maximum penalty for the offense would be a fine of not more than $25,000 or imprisonment not more than twelve years and six months or both.
>
> MR. FINLEY: Yes, sir.
>
> THE COURT: Okay. I take it—are we pleading as a repeater?
>
> MR. LASEE (District Attorney): Yes, Your Honor.
>
> THE COURT: Okay. That will be the base penalty. Then because you are a repeater, then they could increase the incarceration period by not more than an additional six years. And they are basing the repeater enhancement provision on the fact that you were convicted of possession of cocaine as a subsequent offender, and possession of THC as a subsequent offender on September 12th, 2008, in Brown County. Do you remember those felonies?
>
> MR. FINLEY: Yes, sir.
>
> THE COURT: And they are also charging that you used a dangerous weapon. And for the enhancement provision of using a dangerous weapon then the term of imprisonment can be increased by not more than five years for that. Do you understand that then?
>
> MR. FINLEY: Yeah.

> THE COURT: All right. So, the maximum you would look at then nineteen years six months confinement. Do you understand the maximum penalties?
>
> MR. FINLEY: Yes, sir.

(90:3-4).

The court accepted Finley's plea, and he returned to court for sentencing on October 19, 2012. The state recommended the court sentence Finley to ten years of initial confinement and five years of extended supervision. (92:12). The court sentenced Finley to a total of 23.5 years, comprised of eighteen years and six months of initial confinement and five years of extended supervision, stating:

> I am going to impose the maximum sentence in this case. I calculate that to be twenty-three point five years consisting of eighteen point five years of initial confinement and five years of extended supervision.

(92:30-31).

Finley filed a postconviction motion seeking plea withdrawal, or alternatively, that the court commute his sentence to a total of 19.5 years as that was the maximum penalty explained to him at the plea hearing. (63; App. 141-147). For the plea withdrawal claim, Finley argued the court had failed to ensure Finley's understanding of the maximum potential imprisonment penalty at the plea hearing, and that in fact Finley did not know the maximum potential term of imprisonment. (63:3-5; App. 113-115). He argued that the correct maximum penalty Finley faced was 23.5 years, which the court eventually imposed, but that the plea colloquy showed Finley was incorrectly told the maximum potential penalty was 19.5 years.

Judge Atkinson held a hearing on the motion on July 19, 2013. (93; App. 118-131). The state argued that Finley had failed to establish a *prima facie* case and that the burden had not shifted to the state, based on ***State v. Taylor***. The prosecutor argued that Finley "was fully aware of what the maximum penalty was in this case was [sic] in spite of the fact that he was erroneously informed regarding the total amount of the maximum penalty in this case." (93:6; App. 123). He argued that the "record is replete with information establishing that the defendant knew what the maximum penalty was and that's exactly what he got." (93:8; App. 125).

The court agreed with the state and denied Finley's motion. Finley filed a notice of appeal from the judgment of conviction and order denying postconviction relief. (69; 72).

As noted above, this court reversed the trial court's order and remanded the case for an evidentiary hearing. At the hearing, the state called Finley's trial attorney, Jason Farris, to testify. On direct examination, Attorney Farris testified that his normal practice with clients is to cover the specific exposure that a client faces upon a plea of guilty. (93.2:9; App. 119). He testified that "to the best of [his] knowledge," Finley was aware of the maximum potential penalties for the crime and the enhancers relevant to his case. (93.2:10; App. 120).

On cross-examination, Attorney Farris testified he had no specific recollection of telling Finley the maximum penalties relevant to his case. (93:2:11; App. 121). With respect to the maximum penalty which appears on the plea questionnaire in Finley's case, Attorney Farris noted that the form states Finley faced a maximum potential penalty of 19.5 years of initial confinement, and that that number is

typed on the form. (93.2:12; App. 122). Attorney Farris testified that he had "racked [his] brain," but had no recollection of where that number came from. (*Id.*). He testified that "the number came from somewhere and I wrote it down, so obviously there is some sort of math error that was made or typo of one form or another." (93.2:15; App. 125). He also testified that his practice in reviewing a plea questionnaire and waiver of rights form is to go through the questionnaire line-by-line with the client, and that it would be his practice to repeat the maximum penalty listed on the plea questionnaire to the client. (*Id.*).

The trial court denied Finley's motion to withdraw his plea. (93.2:24; App. 134). However, the court modified Finley's sentence to 19.5 years, which was the number he was told at the time of the plea, consisting of 14.5 years of initial confinement and five years of extended supervision. (93.2:23-24; App. 133-34).

Finley again appeals, asking that the court allow him to withdraw his guilty plea.[2]

[2] In his postconviction motion and in his first appeal, Finley asked the court to commute his sentence to the 19.5 years that he was told he faced in light of his plea. At the evidentiary hearing conducted on June 13, 2014, Finley withdrew that claim, stating that he wished only to withdraw his plea. The court denied his motion to withdraw his plea, but commuted his sentence to a total of 19.5 year, consisting of 14.5 years of initial confinement and 5 years of extended supervision.

ARGUMENT

Because the State Failed to Prove Finley Understood the Maximum Penalties He Faced Due to His No Contest Plea, The Trial Court Incorrectly Denied Finley's Motion to Withdraw His Plea.

Timothy Finley's plea was not knowingly, voluntarily, and intelligently entered because he did not know the maximum penalties he faced upon conviction. While his no contest plea exposed him to possible imprisonment of 23.5 years, the plea questionnaire stated the penalty was 19.5 years, and the trial court repeated that number in its plea colloquy. He seeks withdrawal of his guilty plea because it was not knowingly, voluntarily and intelligently entered.

"When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906, *citing* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. "One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea. ***Id.*** (citations omitted). A defendant's plea is not knowing, voluntary and intelligent if he or she is not aware of the potential penalties he or she faces. ***Brown,*** 293 Wis. 2d at 617, ¶35.

State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), provides the framework for a defendant who seeks plea withdrawal post-sentencing. Whenever the procedure set forth in Wis. Stat. § 971.08 is not followed, or whenever the court does not fulfill other mandated duties at the plea

hearing, the defendant may move for withdrawal of his or her plea. ***Id.*** at 274. "The initial burden rests with the defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08 or other mandatory procedures…." ***Id.***, (citations omitted). The defendant must also allege he in fact did not know or understand the information which should have been provided at the plea hearing. ***Id.*** Once the defendant shows his plea was accepted without meeting the requirements of Wis. Stat. § 971.08 or other mandatory procedures, and also alleges he did not know or understand the information which should have been provided at the plea hearing, the burden shifts to the state to prove by clear and convincing evidence that the defendant's plea was nevertheless knowingly, voluntarily and intelligently entered. ***Id.***

In Finley's first appeal, this court concluded that Finley had met his initial burden of showing his plea was accepted without the trial court's conformance with Wis. Stat. § 971.08 or other mandatory procedures. (100; App. 101-110). Specifically, the court concluded Finley had established a *prima facie* case that his plea was accepted even though he had not been informed of the correct maximum potential penalties he faced as a result of his plea. (100: ¶16; App. 109). This court remanded the case to the trial court for an evidentiary hearing at which the burden would shift to the state to prove Finley's plea was knowing and voluntary. (100:¶21; App. 110).[3]

On remand, the trial court held a hearing at which Finley's trial attorney, Jason Farris testified. (93.2). Having heard Attorney Farris' testimony, the trial court denied

[3] It appears there is an error in the court of appeals' opinion, as the numbered paragraphs proceed from ¶1 to 16, but then jump to ¶21.

Finley's motion for plea withdrawal, but modified the sentence to a total of 19.5 years because that is the number he was told at the time of the plea hearing. The trial court found that Finley knew the maximum penalties he faced as a result of his plea, despite Farris' testimony that he had no recollection of telling Finley the correct penalty, and the penalty typed in on the plea questionnaire was incorrect.

Because the state failed to prove that Finley in fact knew the maximum penalty he faced upon conviction of the crime and the repeater enhancers he faced as a result of his plea, the trial court's order must be reversed, and Finley must be allowed to withdraw his plea.

In determining whether the state met its burden of showing Finley's plea was entered knowingly, intelligently and voluntarily, this court accepts the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. ***State v. Hoppe***, 2009 WI 41, ¶45, 317 Wis. 2d 161, 765 N.W.2d 794. This court independently determines whether those facts demonstrate that the defendant's plea was knowing, voluntary and intelligent. ***Id.***

The circuit court here did not point to specific testimony by trial counsel, or other parts of the record, in order to conclude that Finley in fact understood at the time of his plea that he faced 23.5 years of imprisonment as opposed to 19.5 years of imprisonment. The court simply stated at both the hearing and in its written decision that: "The Court now finds that the State met its burden of establishing that Finley knew the maximum penalty he faced at the time he entered his plea." (109:3; App. 139).

To the extent that the trial court's ruling constitutes findings of fact, those findings are clearly erroneous. The only evidence presented at the postconviction hearing was

trial counsel's testimony. Trial counsel testified that, while his usual practice is to review the maximum penalties with his clients prior to a plea hearing, and presumably he attempts to give accurate information, in this case he could not account for how he arrived at the 19.5 years that appears on the plea questionnaire. He also testified that his usual practice would be to review a plea questionnaire line-by-line with his clients, and in this case, it is undisputed that the plea questionnaire has the incorrect maximum penalty on it. It reads 19.5 years, rather than the 23.5 years which was the correct maximum penalty, and which also was the number of years the court actually imposed at the original sentencing. Trial counsel's undisputed testimony was the only evidence proffered by the state in its attempt to prove that Finley understood the maximum penalty he faced was 23.5 years, and not the 19.5 years which was stated out loud by the trial judge at the plea hearing and which was typed in on the plea questionnaire. Trial counsel's testimony does not constitute the clear and convincing evidence that is required to show the defendant's plea was knowing, voluntary and intelligent, despite the defects in the plea colloquy. *See* ***Hoppe***, 317 Wis. 2d 161, ¶44.

The court in ***Hoppe*** explained that the state may rely on the "totality of the evidence," and can include testimony of both the defendant and defense counsel, documentary evidence, and transcripts of other court proceedings to satisfy its burden. ***Hoppe***, 317 Wis. 2d 161, ¶47. As the court stated in ***State v. Nichelson***, 220 Wis. 2d 214, 222, 582 N.W.2d 460 (Ct. App. 1998), the state can call the defendant as a witness in order to demonstrate that the defendant understood the information that was missing from the plea colloquy.

Attorney Farris' testimony, however, touched only on his actions in this case, and did not address his perception of

whether Finley in fact understood the applicable penalties. Although Attorney Farris testified that "to the best of his knowledge," Finley knew the maximum penalties, he did not offer any testimony to explain this belief. (93.2:10). Counsel did not pursue questioning to determine how Attorney Farris explained the penalties to Finley, when that occurred, how much time was spent reviewing the plea agreement and plea questionnaire, or other relevant facts which would allow a court to conclude that Finley understood the applicable maximum penalties despite the incorrect information on the plea questionnaire and in the in-court colloquy.

In ***Nichelson***, the court said that, in order to meet its burden, the state must present some "affirmative evidence of the defendant's then existing mental state." ***Id.*** at 224-225. In ***State v. Jipson***, 2003 WI App 222, ¶11, 267 Wis. 2d 467, 671 N.W.2d 18, the court said that even when a defendant's *prima facie* case may seem incredible, the state must present affirmative evidence to rebut it. Here, the state did not introduce affirmative evidence of the Finley's mental state at the time of the plea hearing in June of 2012. The evidence points to the conclusion that, not only was Finley's *prima facie* case *not* incredible, the most likely conclusion is that Finley believed he faced 19.5 years, because that is the number that is on the plea questionnaire, and the number stated aloud by the trial court at the plea hearing.

Although permitted to do so, the state did not call Finley to testify, presented no documents to show Finley was informed of the correct maximum penalty, and did not reference any transcripts which would demonstrate that Finley understood the correct maximum penalty.

Although the court in ***Hoppe*** stated that the state may rely on transcripts to demonstrate a defendant's

understanding, the state here could not rely on transcripts because they do not demonstrate Finley was ever informed of the correct maximum penalty he faced at the time of the plea hearing. At the initial appearance on June 10, 2011, the defense waived reading of the complaint, and no one mentioned the maximum potential penalties. (77). At the balance of the initial appearance on June 17, 2011, Finley appeared with Attorney William Donarski, who stated that he had discussed the case with Finley and that "[h]e's aware of the nature of the charges and the penalties." (78:2). No one stated the applicable charges and penalties, however. At the arraignment on August 1, 2011, Attorney Donarski again stated he had discussed "the nature of the charges and the maximum penalties" with Finley, but did not elaborate. (80:2). At the following hearing on September 16, 2011, a status conference, Attorney Donarski moved to withdraw, and his motion was granted. (81:2).

By the time of the pretrial on November 28, 2011, Attorney Farris had been appointed to represent Finley, and he asked the court to order a competency evaluation for Finley, stating Finley was "hearing voices." (85:2). No mention is made of the maximum penalties from that point forward until the plea hearing on June 25, 2012. This is not surprising because the hearings between the arraignment and the plea hearing were focused on whether Finley was competent to proceed. Accordingly, the state could not point to any evidence from these proceedings to establish that Finley must have known the correct penalties, with all of the relevant enhancers, at the time of the plea hearing.

Nor could the state rely on the criminal complaint or information, as those documents include charges which were ultimately dismissed, and therefore, the penalties Finley faced were different from those applicable at the time of the plea.

In addition, the charging documents list the penalties, but do not add them up for the defendant. And, while the information included the repeater enhancer (12), the criminal complaint did not. (2).

Further, this case took a long time to reach a conclusion. Finley's initial appearance occurred on June 10, 2011, and he did not enter his plea until a year later, June 25, 2012. Many of the proceedings were focused on Finley's competency to proceed. Although Finley was ultimately found competent, the questions about his competency bolster his claim that he did not know the maximum penalty he faced when he entered his plea on June 25, 2012. In this sense, his situation was similar to that of the defendant in ***Nichelson***, who was "borderline mentally retarded." ***Nichelson***, 220 Wis. 2d at 219, fn. 2. While Nichelson's low IQ is surely different from the competency concerns in Finley's case, both defendants had deficits that would make understanding a complicated penalty structure difficult.

And, ***Nichelson*** predated Truth-in-Sentencing, when sentence structures were not bifurcated between terms of initial confinement and extended supervision, with enhancers applicable only to the initial confinement term. Compared with a bifurcated sentence, pre-TIS sentences were simple to state and understand. As this court pointed out in its opinion on Finley's first appeal, the plea colloquy was confusing here because of the "imprecise language used." (100:¶12; App. 107). The court observed that the trial court did not use conventional terms such as "bifurcated sentence," "initial confinement," or "extended supervision." (*Id.*). Rather, the court said, "during its explanation of the potential sentence, the court utilized the following terms, in order: 'maximum penalty,' 'imprisonment,' 'base penalty,' 'incarceration

period,' 'term of imprisonment,' 'the maximum,' 'confinement,' and 'maximum penalties.'" (*Id.*)

In sum, the 23.5 year penalty Finley faced in light of his conviction was complicated. He faced the maximum sentence for a Class F felony, enhanced by the dangerous weapon enhancer and the repeater enhancer, for a total of 23.5 years. He was erroneously informed at the plea hearing he faced 19.5 years. The court eventually imposed a sentence that exceeded the 19.5 years he had been told was the maximum penalty. Postconviction, the state failed to meet its burden of proof that Finley understood the maximum penalty he faced at the time of the plea hearing in spite of the deficient plea colloquy. Attorney Farris' testimony did not establish that Finley understood he faced 23.5 years of imprisonment instead of the 19.5 years stated in court and on the plea questionnaire.

CONCLUSION

For the above reasons, Timothy Finley, Jr., respectfully requests that the court reverse the trial court's denial of his motion to withdraw his no contest plea.

Dated this 12th day of January, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,197 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of January, 2015.

Signed:

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Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 12th day of January, 2015.

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