STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2015AP000475-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARTIN F. KENNEDY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION, SENTENCE IMPOSED AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 4

ARGUMENT 5

I. The Trial Court Properly Denied Kennedy's Post-Conviction Motion Under *Bangert* 5

II. The Trial Court Properly Denied Kennedy's Post-Conviction Motion Under *Nelson/Bentley* 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES CITED

Page

Boykin v. Alabama,
395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).....5

Hill v. Lockhart,
474 U.S. 52, 106 S.Ct. 366 (1985).....10

Libke v. State,
60 Wis. 2d 121, 208 N.W.2d 331 (1973).....5

Nelson v. State,
54 Wis. 2d 489, 195 N.W.2d 629 (1972).....1, 4, 5, 8, 9

Rutledge v. United States,
517 U.S. 292 (1996).....6

State v. Bangert,
131 Wis. 2d 246, 389 N.W.2d 12 (1986).....1, 4, 5, 6 ,9

State v. Bentley,
201 Wis. 2d 303, 548 N.W.2d 50 (1996).....1, 4, 5

State v. Byrge,
237 Wis.2d 197, 614 N.W.2d 477 (2000).....6

State v. Harper,
57 Wis. 2d 543, 205 N.W.2d 1 (1973).....10

State v. Howell,
301 Wis. 2d 350, 734 N.W. 2d 48 (2007).....4, 5

State v. Kosina,
226 Wis.2d 482, 595 N.W.2d 464 (Ct.App.1999).....6, 7

State v. Myers,
199 Wis.2d 391, 544 N.W.2d 609 (Ct.App.1996).....7

State v. Plank, 2005 WI App,
282 Wis.2d 522, N.W.2d 235, *review denied*,
2005 WI 136, 285 Wis.2d 630, 703 N.W.2d 379 6

State v. Rock,
92 Wis. 2d 554, 285 N.W.2d 739 (1979).....9

State v. Sanchez,
201 Wis. 2d 219, 548 N.W.2d 69 (1996).....9, 10

State v. Sutton,
294 Wis.2d 330, 718 N.W.2d 146 (2006).....6

State ex rel. Warren v. Schwarz,
219 Wis.2d 615, 579 N.W.2d 698 (1998).....5

Strickland v. Washington,
466 U.S. 668 (1984).....9, 10

Torrey v. Estelle,
842 F.2d 234 (9th Cir.1988) 6

WISCONSIN STATUTES CITED

§ 940.19(1) 2

§ 947.01 7

§ 968.075(1)(a).....2, 7

§ 973.055(1) 7

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

Appeal Case No. 2015AP000475-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARTIN F. KENNEDY,

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ON APPEAL FROM THE JUDGMENT OF CONVICTION, SENTENCE IMPOSED AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1) Did the trial court properly deny Kennedy's motion to withdraw his plea under the standard set forth in *Bangert*?

   Brief answer: Yes

2) Did the trial court properly deny Kennedy's motion to withdraw his plea under the standards set forth in *Nelson* and *Bentley*, respectively?

   Brief answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Under section 809.22(2)(b), Stats., this decision isn't eligible for publication. Furthermore, pursuant to § 809.23, Stats., publication is not requested.

STATEMENT OF THE CASE

On December 11, 2013, a criminal complaint was filed in Milwaukee County Case Number 2013CM5412. (R2:1-2). Kennedy was charged with Misdemeanor Battery (Domestic Abuse Assessments), contrary to Wisconsin Statute Sections 940.19(1) and 968.075(1)(a), respectively. (R2:1). The complaint alleged during an argument, Kennedy lunged at M.K., his wife, in a threatening manner. (R2:1). M.K. responded by splashing Kennedy with beer, which caused Kennedy to strike M.K. in the back of the head. (R2:1). M.K. fell to the floor and sustained a laceration requiring 20 stitches to repair and a broken ankle. (R2:1).

The charging language not only outlined the maximum possible penalty upon conviction for misdemeanor battery, but also that the charge is an act of domestic abuse and costs upon conviction would include the domestic abuse assessment. (R2:1).

During Kennedy's initial appearance in this criminal matter, Court Commissioner Maria Dorsey informed Kennedy that he had been charged in the complaint with misdemeanor battery, domestic abuse assessment. (R22:2). In so informing Kennedy of the charge, Commissioner Dorsey confirmed with Kennedy that he understood the maximum penalties if convicted of the offense. (R22:2-3).

On March 13, 2014, pursuant to plea negotiations, Kennedy informed the Honorable Judge Mel Flanagan that it was his decision to admit to an amended charge of disorderly conduct. (R23:3). In conducting the plea colloquy, Judge Flanagan confirmed with Kennedy that he understood the elements for disorderly conduct. (R23:4). Furthermore, Kennedy confirmed that he was not promised anything except for the State's agreement to amend the criminal charge from

battery to disorderly conduct and to recommend probation. (R23:6).

Kennedy confirmed with Judge Flanagan that he understood the maximum possible penalty upon a conviction for disorderly conduct. (R23:7-8). Additionally, Kennedy confirmed that he had read the criminal complaint. (R23:8). The only fact Kennedy disputed in the criminal complaint was that he struck M.K. (R23:8). Kennedy then entered a guilty plea to disorderly conduct, which Judge Flanagan accepted, and a judgment of conviction was entered into the record on March 13, 2014. (R23:9).

On May 12, 2014, Kennedy appeared before the Honorable Judge Rebecca F. Dallet for sentencing. (R24:2). In making a sentencing recommendation for twenty four months of probation, the State set forth on the record the incident giving rise to this prosecution. (R24:3-4). In so doing, the State made clear that Kennedy caused his wife, M.K., to sustain a laceration and a fractured ankle during an argument. (R24:4).

Prior to imposing sentence, Judge Dallet confirmed with Kennedy the state and nature of his employment. (R24:6-7). When Kennedy explained that he worked for a security company, Judge Dallet asked him if he was aware that he was prohibited from possessing a firearm and confirmed with Kennedy that he does not carry a firearm during his employment. (R24:7). Then when Judge Dallet sentenced Kennedy, she informed him that as a result of this conviction he was prohibited from ever possessing a firearm. (R24:9-10). Kennedy confirmed that he understood this fact. (R24:10). Furthermore, Judge Dallet ordered the payment of all costs, fees, and assessments, which included the domestic abuse assessment. (R24:11).

On February 13, 2015, Kennedy filed his Motion for Postconviction Relief. (R17:1). On February 17, 2015, Judge Dallet filed a Decision and Order denying Kennedy's Motion for Postconviction Relief. (R18:1). In denying Kennedy's motion without a hearing, the trial court held that Kennedy was not entitled to withdraw his plea on the basis that the plea colloquy was deficient. (R18:3). In so ruling, the trial court held that although the crime for which Kennedy was convicted

qualified as an act of domestic abuse, this was not an element of the crime for disorderly conduct. (R18:3). Furthermore, nothing more than Kennedy's understanding of the elements for the crime of disorderly conduct was required during the plea colloquy. (R18:3). The trial court also held that the record made during the pendency of Kennedy's criminal case made clear that Kennedy was aware that the crime with which he was charged qualified as an act of domestic abuse. (R18:4). In so ruling, the trial court noted that Kennedy failed to provide any legal authority to show that trial counsel had a duty to advise him of the domestic abuse modifier or assessment. (R18:4). On May 8, 2015, Kennedy filed a timely appeal of the trial court's ruling.

STANDARD OF REVIEW

A claim that a person is entitled to withdraw his guilty plea on the grounds that the plea was not knowingly, voluntarily, and intelligently entered, because the trial court failed in its mandatory duties is governed by *State v. Bangert*, 131 Wis. 2d 246, 389 N.W. 2d 12 (1986), and its progeny. Under that analysis, a court must hold a hearing if the defendant makes a prima facie showing that the plea was accepted without the trial court's conformance with Wis. Stat. § 971.08 or other mandatory procedures, and that the defendant did not know or understand the information that should have been provided at the plea colloquy. *State v. Howell*, 301 Wis. 2d 350, 368, 734 N.W. 2d 48, 57 (2007). At that hearing, the burden shifts to the state to show that the plea was knowing, intelligent, and voluntary. *Howell*, 301 Wis. 2d at 368-369. On review, the appellate court determines the sufficiency of the motion independently of the circuit court, but benefiting from the lower court's analysis. *Howell*, 301 Wis. 2d at 369.

If a defendant moves to withdraw his plea for any reason other than the sufficiency of the court's colloquy, the motion is governed by the *Nelson/Bentley* line of cases.[1] Under that standard, to warrant a hearing, the court must grant a hearing if the motion alleges facts which, if true, would entitle the defendant to relief. If the defendant fails to allege such facts in

[1] *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

his motion, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may, in the exercise of its discretion, deny the motion without a hearing. *Howell,* 301 Wis. 2d at 386-87 (internal citations and footnotes omitted). Whether a motion alleges facts warranting relief, thus entitling a defendant to a hearing, is a legal issue the appellate court reviews *de novo*. If the motion and affidavits fail to allege sufficient facts, and the trial court denies the post-conviction motion without a hearing, this court reviews that denial solely to determine whether the court erroneously exercised discretion. *State v. Bentley*, 201 Wis. 2d 303, 309-311, 548 N.W.2d 50, 53-55 (1996).

ARGUMENT

"A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." *Bangert*, 131 Wis. 2d at 288-89. Manifest injustice requires the showing a of a serious flaw in the fundamental integrity of the plea. *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331, 335 (1973). "[I]f a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. However, [1] if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or [2] presents only conclusory allegations, or [3] if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629, 633 (1972).

I. The Trial Court Properly Denied Kenney's Post-Conviction Motion Under *Bangert.*

"It is well-settled that a guilty plea must be knowingly, voluntarily and intelligently entered, *see Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Bangert*, 131 Wis.2d at 257; a manifest injustice occurs when the plea is entered involuntarily." *State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 635-36, 579 N.W.2d 698, 708 (1998).

There are a number of mandatory duties required of the trial court during a plea colloquy, some of which are outlined in *State v. Bangert*. *Bangert*, 131 Wis. 2d at 261-62. One such duty is "to establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries." *Id*. at 246. "Making a defendant aware of the potential punishment generally means that a defendant must be aware of the direct consequences of his or her plea." *State v. Sutton*, 294 Wis.2d 330, 339, 718 N.W.2d 146, 150 (2006) (*see State v. Byrge*, 237 Wis.2d 197, 614 N.W.2d 477 (2000)). "A direct consequence of a plea has "a definite, immediate, and largely automatic effect on the range of a defendant's punishment." *Id*. at 150-51. A trial court, however, is not required to inform a defendant of collateral consequences of a plea. *Id*. at 151. In so finding, the Court in *Sutton* held that the maximum term of imprisonment, as an "immediate and inflexible consequence," is a direct consequence. *Id*. at 152 (*see*, *e.g.*, *State v. Plank*, 2005 WI App ¶ 16, 282 Wis.2d 522, 699, N.W.2d 235, *review denied*, 2005 WI 136, 285 Wis.2d 630, 703 N.W.2d 379). That said, the Court also explained that the maximum term of initial confinement of a bifurcated sentence is a collateral consequence of a plea. *Sutton*, 294 Wis.2d at 340.

The trial court properly denied Kennedy's post-conviction motion without a hearing not only because the record conclusively shows that Kennedy was not entitled to the relief requested, but also because his motion failed to allege sufficient facts that, if true, would entitle him to relief.

In *Rutledge v. United States*, 517 U.S. 292, 302 (1996), the Supreme Court of the United States held that the imposition of an assessment required under 18 U.S.C. §3013 was merely a collateral consequence of the underlying conviction. *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir.1988). Furthermore, discussing the parameters of a collateral consequence, the Court of Appeals in *State v. Kosina* held that "a particular consequence is deemed "collateral" because it rests in the hand of another government agency or different tribunal. *Kosina*, 226 Wis.2d 482, 467, 595 N.W.2d 464, 467 (Ct.App.1999) (*see Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir.1988)). Furthermore, "it can also be collateral because it depends upon

future proceedings." *Id*. (*see State v. Myers*, 199 Wis.2d 391, 394, 544 N.W.2d 609, 610-11 (Ct.App.1996)).

Within the context of the federal firearm prohibition upon conviction for a crime of domestic abuse, the *Kosina* Court held that this restriction is not a direct consequence "because a direct consequence must have a direct, immediate, and automatic *effect on the range of Kosina's punishment* for disorderly conduct," even though the prohibition would apply immediately upon conviction. *Id*. at 488 (emphasis added).

In his appeal from the trial court's denial of his post-conviction motion, Kennedy argues that the domestic abuse assessment is a separate and distinct element of disorderly conduct. This is statutorily incorrect. The crime of disorderly conduct is outlined in § 947.01, Stats. In that statute section, there is no mention of a domestic abuse component. The domestic abuse modifier and assessment are controlled by §§ 968.075 Stats., and 973.055(1), Stats. The statute for disorderly conduct controls that conduct which is criminal. Whereas the purpose of § 968.075 Stats., is to govern not only when an arrest is mandatory, but also law enforcement and prosecutorial policies in domestic abuse cases. Furthermore, this statute also defines what conduct qualifies as domestic abuse. Additionally, § 973.055(1) Stats., outlines the assessment the court is to order upon conviction for an enumerated crime and upon finding that the conduct constituting the violation qualifies as an act of domestic abuse. The penalty statute only discusses the imposition of a monetary assessment at sentencing.

Notwithstanding that he did not need to be so informed, the record is clear that Kennedy was, on multiple different occasions, notified that the conduct he was alleged to have committed fell within the purview of a domestic abuse incident. This is without regard to whether he accepted responsibility for criminal battery or criminal disorderly conduct. First, Kennedy was notified that he had been charged in the complaint with misdemeanor battery, domestic abuse assessments, and he acknowledged that he understood the maximum penalties if convicted of the offense during his initial appearance. (R22:2-3). Second, during the plea colloquy, Kennedy not only confirmed an understanding of the maximum possible penalty

upon a conviction for disorderly conduct but also having read the criminal complaint. (R23:7-8). In discussing his review of the complaint and stipulation thereof for a factual basis upon which the trial court could accept his guilty plea, the only fact Kennedy disputed was that he struck M.K. (R23:8). The only amendment ever discussed during the course of the plea colloquy was an amendment of the charged offense, not the domestic abuse modifier nor the imposition of the assessment. Lastly, during the sentencing hearing, Kennedy confirmed his understanding that he was prohibited from ever possessing a firearm. (R24:10).

In addition to ample notice that the crime to which Kennedy plead guilty was one of domestic abuse, the imposition of a domestic abuse assessment is merely monetary in nature, which does not amount to an inflexible consequence. As previously discussed, the maximum term of imprisonment qualifies as a direct and inflexible consequence of a criminal sentence, requiring notice to an accused. The imposition of a monetary assessment does not so qualify. Although there is the potential for incarceration under federal law should an accused possess a firearm, this potential consequence is not direct as there is no direct, immediate, or automatic effect on Kennedy's sentence.

Although the trial court denied Kennedy's motion for post-conviction relief because he was not entitled to the relief requested, Kennedy's post-conviction motion (and subsequent appeal that mirrors his original filing) was also legally insufficient. Kennedy's post-conviction motion was legally insufficient because he merely set forth conclusory allegations and did not articulate a sufficient reason as to why he would be entitled to the relief requested. In *Nelson*, the Court held that a "petitioner should be required to plead sufficient facts in support of his allegations to raise a question as to whether or not a manifest injustice would result from a denial of his motion." *Nelson*, 54 Wis.2d at 496-7.

Kennedy's post-conviction motion is riddled with conclusory statements that the trial court failed to advise him of the applicability of the domestic abuse assessment (at sentencing). After Kennedy outlines the legal authority for plea withdrawal under circumstances where a plea was not

knowingly, intelligently, and voluntarily made, he generally outlines the procedural history of the plea colloquy. (R17:2-3). What follows are merely conclusory statements that Kennedy did not understand that the plea he was entering referenced an act of domestic abuse. (R17:3-4).

In conclusion, the trial court properly denied Kennedy's motion for post-conviction relief under the standard set forth in *Bangert*.

II. The Trial Court Properly Denied Kennedy's Motion under *Nelson*/*Bentley*.

Similarly, the trial court properly denied Kennedy's post-conviction motion without a hearing not only because his motion failed to allege sufficient facts that would entitle him to a hearing, but also the record proved that Kennedy is not entitled to relief under the *Nelson* and *Bentley* standards.

Ineffective assistance of counsel may serve as a "manifest injustice." *State v. Rock*, 92 Wis. 2d 554, 558, 285 N.W.2d 739, 741 (1979). As noted in the paramount Supreme Court decision on ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984),

> the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation….The purpose is simply to ensure that criminal defendants receive a fair trial.

Id. at 689. As noted in *State v. Sanchez*, 201 Wis. 2d 219, 548 N.W.2d 69 (1996), "the test for ineffective assistance of counsel articulated in *Strickland*" is also the test under the Wisconsin constitution. *Sanchez*, 201 Wis. 2d at 236.

In determining an ineffective assistance of counsel claim, the court undertakes a two-step analysis.

> First, the defendant must show that counsel's performance was deficient….Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687. The *Strickland Court* noted that the burden of showing that a defendant was prejudiced by

deficient defense counsel falls upon the defendant. *Sanchez*, 201 Wis. 2d at 232. Additionally, the Court in *Hill v. Lockhart* held that "the same two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process." *Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366 (1985).

Counsel's conduct is deficient if it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The standard of reasonableness is determined by looking at whether defense counsel's representation is equal to what an ordinarily prudent lawyer would give when skilled and versed in criminal law. *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1, 9 (1973).

In regard to the prejudice requirement, the *Strickland Court* held that it would not be sufficient for a defendant to show that defense counsel's errors had a "conceivable effect of the outcome of the proceeding," but rather, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693-4. To satisfy the prejudice requirement, there must be a showing "that there is a reasonable probability that, but for counsel's errors," a defendant would not have plead guilty but rather would have insisted on a trial. *Lockhart*, 474 U.S. at 59.

Kennedy argues that he did not knowingly, voluntarily, or intelligently enter his guilty plea because trial counsel was ineffective by failing to specifically inform him that the domestic abuse modifier was applicable and the surcharge would likely be assessed. Therefore, because trial counsel failed to so inform him, Kennedy should be entitled to withdraw his plea. The trial court, however, properly denied Kennedy's post-conviction motion without a hearing not only because his motion failed to allege sufficient facts that would entitle him to relief, but also because the record is clear that Kennedy was not entitled to the relief sought.

Kennedy's sole argument is that but for the impact that the imposition of the domestic abuse assessment had on his security and hunting licenses, he would not have plead guilty. (R17:6). Without more, this pleading is hardly sufficient and is entirely conclusory.

Furthermore, notwithstanding the sufficiency of the pleading, the record established conclusively that Kennedy was not entitled to relief. Kennedy was not entitled to withdraw his guilty plea for lack of notice that the domestic abuse assessment may be imposed because he was provided with ample notice. First, Kennedy was notified that he had been charged in the complaint with misdemeanor battery, domestic abuse assessments, and he acknowledged that he understood the maximum penalties if convicted of the offense during his initial appearance. (R22:2-3). Second, during the plea colloquy, Kennedy not only confirmed an understanding of the maximum possible penalty upon a conviction for disorderly conduct but also having read the criminal complaint. (R23:7-8). In discussing his review of the complaint and stipulation thereof for a factual basis upon which the trial court could accept his guilty plea, the only fact Kennedy disputed was that he struck M.K. (R23:8). Lastly, during the sentencing hearing, Kennedy confirmed his understanding that he was prohibited from ever possessing a firearm. (R24:10).

This record cuts to the heart of Kennedy's argument that he was not aware of the potential imposition of the domestic abuse assessment. Furthermore, as the trial court noted, Kennedy failed to provide any legal authority that shows a duty of trial counsel to advise him of the domestic abuse modifier in addition to notice he previously received. (R18:4). Additionally, any consequences that may result from the imposition of the domestic abuse assessment are collateral, not direct. Therefore, to the extent trial counsel did not properly notify Kennedy of the potential applicability of the domestic abuse assessment, he did not adequately argue any prejudice from such a collateral consequence.

In her written order, the trial court stated, "the defendant's claim that he was unaware of the full charge or the assessment is unavailing." (R18:4). Therefore, the trial court properly denied Kennedy's post-conviction motion without a hearing.

CONCLUSION

For all of the reasons stated above, the State of Wisconsin respectfully asks this Court to affirm the decision of the trial court.

Dated this _____ day of June, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3,496.

_____
Date

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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 s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

_____ _____

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