IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0642

IN THE MATTER OF:

D.E./A.E.,

Youths in Need of Care.

APPELLANT'S REPLY BRIEF

On Appeal from Montana Second Judicial District Court, Bute-Silver Bow County
The Honorable Brad Newman, Presiding

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Respectfully submitted this 19th day of June, 2018.

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RESTATEMENT OF THE ISSUES

I. Whether the district court erred in concluding that ICWA did not apply and erroneously terminated T.E.'s parental rights in the absence of a conclusive tribal determination of the children's status as Indian children as defined by the Indian Child Welfare Act and in violation of mother's rights to due process, requiring reversal.

II. Whether the District Court abused its discretion in terminating T.E.'s parental rights by failing to hold the Department to its burden of proof and instead shifting the burden onto T.E. by faulting T.E. for not putting forth evidence of treatment plan compliance and likelihood of change in the conduct or condition rendering her unfit to parent within a reasonable time.

SUMMARY OF APPELLANT'S REPLY ARGUMENT

The district court did not afford T.E. fundamentally fair procedures or ensure strict compliance with Indian Child Welfare Act when it had reasons to believe the children may be Indian children due to tribal affiliations of both birthparents, and proceeded with the termination hearing in the absence of evidence that the Department formally sought or received a conclusive tribal determination of the children's eligibility for tribal enrollment with the Blackfeet Tribe and without

following ICWA's requirements of notice to the tribe, qualified expert testimony and application of heightened standards of proof.

Even if ICWA does not apply, the district court abused its discretion in terminating T.E.'s parental rights by finding by clear and convincing evidence that T.E. did not complete her treatment plan and that the condition rendering T.E. unfit to parent was unlikely to change within a reasonable time. The evidence put forth by the Department was insufficient: it presented no testimony T.E.'s mental health provider, chemical dependency provider, or psychologist to prove noncompliance with the treatment plan ot that the conduct or condition rendering T.E. unfit to parent was ongoing or unlikely to change within a reasonable time. The court also abused its discretion by impermissibly shifting the burden of proof in the termination proceeding from the Department to T.E. to prove compliance with the treatment plan and likelihood of change within a reasonable time.

ARGUMENT

I. The district court committed reversible error in concluding that ICWA did not apply and in proceeding with termination of parental rights in the absence of a conclusive determination by the Blackfeet Tribe of A.E. and D.E.'s status as Indian children as defined by the Indian Child Welfare Act in violation of T.E.'s right to due process.

A. The district court erred in concluding that ICWA did not apply at the adjudication and termination hearings.

At the adjudication hearing, the district court found by a preponderance of the evidence that D.E. and A.E. were youths in need of care. Tr. 10/28/15 at 14.

The district court also concluded that Indian Child Welfare Act ("ICWA") did not apply. Doc. 15; Tr. 10/28/15 at 19. The district court abused its discretion by incorrectly concluding that ICWA did not apply. After reviewing the district court's conclusions of law in this termination proceeding *de novo* for correctness, this Court must reverse the termination of T.E.'s parental rights. *In re L.D.*, 2018 MT 60, ¶ 10 (citing *In re M.P.M.*, 1999 MT 78, ¶ 12, 294 Mont 87, 976 P.2d 988).

In support of its decision that ICWA did not apply, the district court stated, "I know that [L.E.], the birthfather, is deceased and that we have confirmation in the file that ICWA does not apply because the children are not enrollable through father's heritage." Tr. 10/28/15 at 19. In its written Order, the Court applied the non-ICWA standards and did not require testimony of a qualified expert witness before adjudicating the children as youths in need of care. Doc. 15; Mont. Code Ann. § 41-3-437(2), -(8).

However, the conclusion that ICWA did not apply was not supported by evidence in the record or a conclusive tribal determination. By the conclusion of the adjudicatory hearing, the only ICWA-related information before the court came from the Department of Health and Human Services ("DPHHS") Affidavit filed in support of its Petition for Temporary Legal Custody; a "Notice of No ICWA Involvement" filed by counsel for the Department; and the testimony from Child Protection Specialist Matt LeBrun.

The September 2, 2015, affidavits of Child Protection Specialist ("CPS") LeBrun filed in support of both Petitions for Temporary Legal Custody stated, "[t]o the best of my knowledge and belief, the child May Be an Indian Child Subject to the Indian Child Welfare Act as Birth [Father][1] is an enrolled member of the Blackfeet Tribe. ICWA Verifications will be sent out." Doc. 2 at 2. This affidavit supports the conclusion that ICWA did apply.

On September 4, 2018, DPHHS filed a document entitled "Notice of No ICWA Involvement." Doc. 4. This document "advise[d] the Court and all interested parties that the Department has learned that the Indian Child Welfare Act is not involved in this case." Doc. 4. This "Notice" was signed by counsel for DPHHS and contained no supporting documentation or sworn affidavit in support. Statements of counsel are not evidence. *State v. Stuart*, 2001 MT 178, ¶ 22, 306 Mont. 189, 193, 31 P.3d 353, 356 (citing *Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶ 51, 293 Mont. 97, ¶ 51, 973 P.2d 818, ¶ 51). Therefore, this "Notice" submitted by counsel cannot constitute evidence of ineligibility for enrollment by the Tribe and the court erred in relying upon it to conclude that ICWA did not apply.

[1] LeBrun's affidavit mistakenly identified Mother as a member of the Blackfeet Tribe although Father was affiliated with that tribe. Tr. 10/28/15 at 7-8; Appellee Br., 5 (n.2).

Finally, the Court received sworn testimony on October 28, 2015 from CPS LeBrun. During the hearing, LeBrun reiterated that he had contacted the Blackfeet Tribe directly because birthfather L.E. was deceased and L.E. was affiliated with that Tribe. Tr. 10/28/15 at 7-8. LeBrun testified, "they have told me that they are not eligible, just they can only be descendent members." *Id.* at 8. LeBrun stated that ICWA does not apply in this case. *Id.* However, LeBrun admitted that he had not received anything in writing yet from the tribe. *Id.* at 11. LeBrun also admitted that he was aware that T.E. was affiliated with a Tribe. *Id.* at 12. While T.E. had reported to CPS that the children were not enrollable in her tribe, LeBrun admitted that he had not made sure of that by contacting T.E.'s tribe, though he intended to do so. *Id.* at 12. This is the extent of the evidence before the court from which it concluded that ICWA did not apply.

First, the district court's Order adjudicating the children as youths in need of care ignored the likelihood that the children may be Indian children by virtue of their mother's heritage. Tr. 10/28/15 at 12; Doc. 15. Thus, due process[2] and

[2] Appellee contends that T.E.'s due process rights were not infringed during these proceedings and argues, "at no time did Mother challenge the court's judicial determination that ICWA did not apply or assert it was somehow infirm or unsupported." Appellee Br., 22. However, this Court has previously rejected the State's argument that a parent may waive application of ICWA by stipulation or acquiescence. *In re DL*, ¶ 16. Any such acquiescence that ICWA does not apply is "insufficient as a matter of law to satisfy the Court's threshold duty to obtain a

fundamentally fair proceedings required the Court to proceed at the adjudication hearing as though ICWA applied, and to ensure strict compliance with that law. *In re L.D.*, ¶ 17. The Court's erroneous conclusion that ICWA did not apply amounted to a clear abuse of discretion. *In re H.T.*, 2015 MT 41, ¶ 10 (citations omitted).

Second, this Court should review *de novo* the question of ICWA application through L.E.'s heritage in the termination proceedings. *In re L.D.* ¶ 10. LeBrun testified that the children "are not eligible" for enrollment with the Blackfeet Tribe, and he testified that the children can "be descendent members." Tr. 10/28/15 at 8. This testimony was conflicting at best. At the very least, this testimony cannot constitute sufficient "verification" from the Blackfeet tribe of the children's non-Indian status to conclude that ICWA did not apply. *Id.* at 8; Appellee's Br., 17.

Application of ICWA standards in abuse and neglect cases depends on whether a child is an "Indian child," which is defined as (1) any unmarried person under age eighteen and (2) who *either* is "a member of an Indian tribe" *or* is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *In re L.D.*, ¶ 13; 25 U.S.C. § 1903(4) (emphasis supplied). Thus, ICWA applies even if the child is not an enrolled member of the tribe.

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conclusive determination from an Indian tribe of tribal eligibility prior to proceeding with termination proceedings." *In re L.D.* ¶ 16.

ICWA applies where the child's birthparent is a member of an Indian tribe and the child is eligible for membership in that tribe. *Id.* LeBrun's testimony that birthfather L.E.'s tribe was the Blackfeet and his testimony that the children *can* be descendent members of the Blackfeet Tribe does not exclude the children from the statutory definition of "Indian child." The question of descendent eligibility for tribal membership was solely for the Blackfeet tribe to determine. *Id.*, ¶ 14 (citations omitted). It was not a question that the district court, or a social worker, could conclusively or unilaterally determine on this record. *Id.*

The court erred in relying on the social worker's unilateral conclusion from his verbal communication with the Tribe that the children were *not* eligible for membership in the Blackfeet and that therefore ICWA did not apply.[3] In *In re AG,* DPHHS was awarded temporary investigative authority and CPS subsequently sent a request to two Tribes for clarification of the subject children's status as 'Indian children' for the purposes of ICWA. *In re A.G.*, 2005 MT 81, ¶¶ 4, 5, 109 P.3d 756, 326 Mont. 403. The Tribes responded with letters indicating that further information was necessary to determine the children's enrollment status. *Id.* ¶ 5. CPS unilaterally determined that the children were not Indian children and that

[3] Further, no cases cited by the Department would support the conclusion that one oral communication between the tribe and the social worker constitutes a conclusive determination by a tribe as to the child's membership or eligibility for membership.

ICWA did not apply. *Id.* DPHHS subsequently petitioned to terminate parental rights and indicated in the supporting affidavit CPS's previous determination that the children were not Indian children. *Id*., ¶ 6. Despite a letter from the Tribe indicating its intent to intervene, the district court concluded that the children were not eligible for tribal membership. This Court held that the district court erred in relying on CPS's unilateral determination to conclude that ICWA did not apply and that the children were not eligible for membership in an Indian tribe. *Id.*, ¶¶ 5, 16.

Similarly, the district court erred in relying on CPS LeBrun's unilateral determination that the children did not meet the definition of "Indian child" and that ICWA did not apply. The evidence before the court contained CPS's prior statements of belief that the children were Indian children; LeBrun's testimony that the Blackfeet Tribe was birthfather's tribe; LeBrun's testimony that the Blackfeet Tribe said the children can "be descendent members"; LeBrun's testimony that birthmother also was affiliated with a tribe but he had not contacted that tribe yet; the empty "Notice" filed by counsel; and LeBrun's admission that he had not obtained written confirmation from either Tribe of the children's eligibility for enrollment. Doc. 2; Doc. 4; TR 10.28.15 at 7-8, 11, 12. The district court clearly misapprehended the effect of the evidence concerning the application of ICWA to the termination proceedings. The court's determination that ICWA did not apply

was not supported by substantial evidence and was erroneous. As discussed below, because the court had reason to believe the children may be Indian children as defined by the statute, it was required to ensure strict compliance with ICWA and due process of law. *In re L.D.*, ¶ 17.

B. The district court and state erred in not obtaining conclusive tribal verification of eligibility from Blackfeet Tribe before proceeding with termination of parental rights.

After the adjudicatory and dispositional hearings, the district court received no additional conclusive proof from any party as to the children's eligibility for enrollment in the Blackfeet Tribe,[4] and in the absence of a conclusive tribal determination of D.E. and A.E.'s eligibility for that tribal enrollment, this Court must reverse the district court's termination of T.E.'s parental rights.

In re L.D., this Court reversed termination of parental rights where the record was void of a conclusive determination of tribal membership and eligibility. Although the State asserted in its petitions to the district court that L.D. was an Indian child and provided due notice to the Tribe of the foster care and subsequent parental rights termination proceedings, there was "no evidence that the

[4] DPHHS filed ICWA Verification from the Turtle Mountain Band of Chippewa Indians indicating that the children were not members and were not eligible for membership in that Tribe on August, 2016. Doc. 34. However, the record is void of any conclusive determination from the Blackfeet Tribe as to the children's tribal eligibility.

Department ever formally sought or received a conclusive tribal determination that L.D. was or was not eligible for tribal enrollment." *In re L.D.*, ¶ 15. Instead,

> [T]he Department passively relied on the inaction of the Tribe and the assertions or beliefs of the parents that L.D. was not eligible for tribal membership. However otherwise reasonable, this passive reliance was insufficient to satisfy the Department's ICWA burden to actively investigate further and ultimately make formal inquiry with the Tribe for a conclusive determination of L.D.'s membership eligibility.

Id.

The Court articulated the threshold questions of fact for district courts to ask to verify the Indian or non-Indian status of a child in an abuse and neglect proceeding are: (1) whether the court has reason to believe that a subject child may be an 'Indian child" and (2) whether an Indian tribe has conclusively determined that the child is a member or eligible for tribal membership. *In re L.D.*, ¶ 14 (citing *In re AG* ¶¶ 14-17; *In re Riffle*, 273 Mont.237, 242, 902 P.2d 542, 545 (1995); *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* B.2(b), B.3(b), and B.4(c), 80 Fed. Reg. 10146 at 10152-53 (2015).

Before the termination hearing occurred in this case, the evidence before the district court concerning A.E. and D.E.'s Indian child status included CPS's prior statements of belief that the children were Indian children; LeBrun's testimony that the Blackfeet Tribe was the tribe of birthfather; LeBrun's testimony that the Blackfeet Tribe said the children can "be descendent members"; the empty

"Notice" filed by counsel; and LeBrun's admission that he had not obtained written confirmation from the Blackfeet Tribe of the children's eligibility for enrollment; subsequent affidavits from LeBrun averring that the children were, and were not, Indian children subject to ICWA; the absence of any subsequent written confirmation from the Blackfeet tribe as to the children's eligibility for enrollment. Doc. 2; Doc. 4; Doc. 27; Doc. 40; Doc. 42; TR 10/28/15 at 7-8, 11, 12. With this information, the district court had reason to believe that the children may be eligible for enrollment in birthfather's tribe, and therefore may be Indian children. Without evidence that the Department ever formally sought or received a conclusive tribal determination that A.E. and D.E. were not eligible for enrollment with the Blackfeet Tribe, the Department did not satisfy its ICWA burden to actively investigate further and ultimately make formal inquiry with the Tribe. *In re L.D.*, ¶ 15.

In its response, Appellee contends that DPHHS and its attorney "verified that the children were not in fact Indian children." Appellee Br., 1-2. Appellee's argument ignores controlling federal and Montana Supreme Court authority that, "make it clear that *only* an Indian tribe" may determine eligibility for and membership in a Tribe. Appellee Br., 16, 20.

DPHHS's strained efforts to distinguish the facts of this case from *In re L.D.* are unavailing. First, DPHHS contends that it never asserted that A.E. and D.E.

"were" Indian children, but only claimed that they "may" be Indian children. Appellee's Br., 19. Whether DPHHS believed the children "may be" or "are" an Indian child is of no legal consequence because the threshold question district courts must ask is "whether the court has reason to believe that a subject child *may be* an 'Indian child.'" *In re L.D.*, ¶ 14 (emphasis supplied). Here, the Department's assertion that the child "may be an Indian child," triggered the requirement to obtain a conclusive tribal determination. *Id.,* ¶ 16.

Appellee next attempts to distinguish this case from *L.D.* on the grounds that LeBrun believed ICWA may apply to the case only between filing of the initial petition and the empty "Notice" that ICWA did not apply. Appellee Br. 19. DPHHS's account is not entirely correct: LeBrun admitted on October 28, 2015 that he had not sent or received ICWA written verification from either tribe; LeBrun swore in his December 20, 2016 affidavits in support of Approval of Permanency Plans that "to the best of his knowledge and belief, the child is an Indian Child"; and LeBrun cited the ICWA heightened standard of active efforts in that affidavit. Doc. 42 at 2.

Regardless, the Court's holding in *L.D.* did not turn upon how hard or long the Department held the belief that the child may be an Indian child. The Court relied upon state and federal statutes to conclude that when *a court* has reason to believe that a child may be an Indian child, proceeding to termination without a

conclusive tribal determination of tribal membership or eligibility is an abuse of discretion, irrespective of when or if DPHHS disavows the belief. *L.D.* ¶ 14; *In re A.G.*, ¶ 16. Though the Court in *L.D.* noted a "manifest presence" of the belief that *L.D.* may be an Indian Child, this was only in dicta.

Since LeBrun's testimony leading up to and at the adjudication hearing gave the Court reason to believe that the children may be "Indian children" as descendent members; since LeBrun had not obtained or sought formal verification from the Blackfeet Tribe after his verbal contact with an unidentified tribal representative; and since statements of counsel are not evidence, the district court erred in concluding that ICWA did not apply in the absence of a conclusive tribal determination of the children's eligibility for membership in the Blackfeet Tribe. Doc. 2 at 2; Tr. 10/28/15 at 8, 11-12; *Stuart*, ¶ 22. The court committed reversible error in terminating T.E.'s parental rights. *In re A.G.* ¶ 16.

C. The district court violated T.E.'s due process rights throughout the proceedings by failing to apply ICWA standards and statutory requirements.

It is ultimately the Court's responsibility "to demand and ensure strict compliance with ICWA and due process of law regardless of the parties' invitation and escort down the proverbial garden path." *In re LD*, ¶ 17. Here, the district court also violated T.E.'s rights to due process.

The district court applied the lesser standard of the "preponderance of the evidence," at the show cause and adjudication process in violation of T.E.'s due process rights. Tr. 10/28/15 at 14; Mont. Code Ann. § 41-3-437(2). The court also failed to require qualified expert witness testimony regarding whether the continued custody of the child by the parent was likely to result in serious emotional or physical damage to the child. Mont. Code Ann. § 41-3-432(1)(b); Tr. 10/28/15 at 19.

The Court further erred in conducting the termination hearing without providing notice of the proceedings to the Indian child's tribe or to the Secretary of the Interior. 25 U.S.C. § 1912(a); *In re H.T.,* ¶ 26. The Petitions for Permanent Legal Custody, Termination of Parental Rights with Consent to Adoption and Request for Hearing was served upon the attorneys for T.E. and the children, but not upon the Tribe or Secretary of the Interior. Doc. 50 at 7.

The district court also violated T.E.'s rights to due process by not requiring testimony from a qualified expert witness at the termination hearing. 25 U.S.C. § 1912 (f). Nor did the court require proof of active efforts by DPHHS to prevent the breakup of the Indian family. 25 U.S.C. §§ 1912(d). Finally, the court did not hold the department to higher ICWA standard to prove beyond a reasonable doubt that the continued custody of the child by the parent was likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912 (f).

Regrettably, the district court abdicated its responsibility to demand and ensure strict compliance with due process of law when it failed to apply the ICWA standards at the hearing on termination of T.E.'s parental rights, requiring reversal.

II. Even if ICWA does not apply, termination of T.E.'s parental rights must still be reversed because the Department put forth insufficient evidence that T.E. did not complete her treatment plan and that T.E. was unlikely to change within a reasonable time, and because the court shifted the burden of proof from the Department to T.E.

In the event this Court finds the district court was entitled to proceed with termination proceedings despite the absence of a conclusive tribal determination of enrollment eligibility or notice to the tribe, this Court must still reverse the termination of T.E.'s parental rights.

If ICWA does not apply, the State must prove by clear and convincing evidence (1) the child was adjudicated a youth in need of care; (2) an appropriate treatment plan approved by the court was complied with by the parent or was not successful or that it was waived pursuant to § 41-3-609(4), MCA; and (3) the conduct or condition of the parents rendering them unfit was unlikely to change within a reasonable time. The burden of proof to establish the statutory criteria for termination rests with the party seeking termination. *In re D.B*, ¶ 24 (citation omitted).

Testimony presented by DPHHS at the termination hearing did not establish by clear and convincing evidence that T.E. failed her treatment plan and that T.E.'s condition was unlikely to change within a reasonable time. The Department only called one CPS worker who had any real personal knowledge of the case. The other witness's testimony relied primarily upon CPS Waliezer's personal reports about the case. Tr. 6/7/17 at 19-21, 23. The court admitted Waliezer's hearsay statements that T.E. missed appointments for her mental health component of her treatment plan and was discharged from that provider, but DPHHS failed to call T.E.'s mental health provider to testify directly regarding his or her assessment, recommendations, and T.E.'s compliance and prognosis. *Id*., at 11.

DPHHS also failed to elicit testimony from T.E.'s chemical dependency treatment provider concerning T.E.'s evaluation, dependency, or recommendations. No testimony was offered concerning T.E.'s failure of or compliance with the provider's recommendations, T.E.'s prognosis, or whether a licensed addiction counselor believed any chemical dependency issue was not likely to change within a reasonable time.

DPHHS put forth no testimony from any psychologist, admitted no report or evaluation, and offered no testimony or evidence concerning recommendations for care or likelihood of change within a reasonable time.

Consequently, the district court's finding that T.E. failed her treatment plan and that the conduct or condition of T.E. was unlikely to change within a reasonable time was not supported by substantial evidence and amounts to a clear abuse of discretion. *In re E.K*, 2001 MT 279, ¶ 33, 307 Mont. 328, 37 P.3d 690. The court's written order was not based on substantial evidence. Doc. 56.

Finally, the court faulted mother for not proving her success with the treatment plan and her likelihood of change within a reasonable time. Specifically, the court stated, "[n]o professional person has come in here to tell me that mom's unilateral decision to discontinue mental health therapy has any benefit for the children." Tr. 6/7/17 at 51. The court continued, "[r]ather than any competent evidence from a professional person to tell me that those issues are in the past and that the parenting deficits have been resolved, I make the finding that this condition that renders mom unfit to parent the kids is not likely to change in the reasonable foreseeable future." *Id.* at 54.

These statements belie that the court shifted the burden of proof from the Department to T.E. by faulting T.E. for not putting forth testimony from her providers to the effect that T.E.'s behavior concerning the treatment plan was consistent with the recommendations of the providers. Because it was DPHHS's burden to prove that T.E. failed to comply with the treatment plan, it was DPHHS's obligation to elicit testimony to prove, by clear and convincing

evidence, that T.E. was not compliant and that her behavior was not in keeping with the provider's recommendations. Instead, the court faulted T.E. for failing to prove that her parenting deficits were resolved and for failing to prove that her discontinuation of mental health care was in compliance with her treatment plan. Tr. 6/7/2017 at 54. Consequently, the district court abused its discretion by shifting the burden from the Department and onto T.E to prove by a clear preponderance that T.E. had *not* failed her treatment plan and that her conduct or condition was *likely* to change within a reasonable time. *Id.* at 50-51, 54. The district court abused its discretion in terminating T.E.'s parental rights without definite proof by DPHHS.

CONCLUSION

The district court clearly erred in concluding that ICWA did not apply in this case. The court violated T.E.'s right to due process and fundamentally fair proceedings by proceeding to terminate T.E.'s parental rights in the absence of a conclusive tribal determination that the children were ineligible for Blackfeet Tribal enrollment.

Even if ICWA does not apply, this Court must reverse termination of T.E.'s parental rights because the Court abused its discretion by finding that DPHHS proved by clear and convincing evidence that T.E. failed her treatment plan and

that her conduct or condition was unlikely to change within a reasonable time, and impermissibly shifted the burden of proof to T.E..

T.E. respectfully requests that this Court reverse the Order of the District Court terminating her parental rights to and remand the case for further proceedings.

Respectfully submitted this 19th day of June, 2018.

By: /s/ Jennifer A. Dwyer

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double- spaced except for footnotes and quoted and indented material, and the word count calculated by Microsoft Word for Windows is 4,423 words, excluding certificate of services and certificate of compliance.

By: /s/ Jennifer A. Dwyer

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CERTIFICATE OF SERVICE

I, Jennifer Dwyer, hereby certify that I have served a true and accurate copy of the foregoing Appellant's Reply Brief to the following on June 19, 2018:

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I, Jennifer Ann Dwyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-19-2018:

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