

NO. 18-1908

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL BRYCE SILK, JR.,

Petitioner/Appellant,

v.

UNITED STATES OF AMERICA,

Respondent/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

BRIEF OF APPELLEE

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SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT

Samuel Bryce Silk, Jr. (Silk) appeals from an order issued by Chief Judge Daniel L. Hovland of the United States District Court for the District of North Dakota denying Silk's motion pursuant to 28 U.S.C. § 2255. Silk was sentenced on June 29, 2015. Silk filed a motion to dismiss the indictment and a motion under 28 U.S.C. § 2255 on March 28, 2016. The district court denied Silk's motions on November 9, 2016.

On June 1, 2017, Silk was granted a certificate of appealability by the Eighth Circuit. The Court remanded the case for the district court to consider two questions: (1) whether there were any other procedural hurdles prohibiting Silk from seeking relief under § 2255; and (2) whether Silk had two prior qualifying convictions that had become final prior to July 12, 2014.

On March 27, 2018, the district court again denied relief to Silk finding he was procedurally barred from raising his claim, and that he did, in fact, have two prior qualifying convictions that had become final prior to July 12, 2014. Silk has appealed again.

The United States respectfully submits that this case involves legal arguments adequately presented in the briefs and record and that the decisional process of the Court would not be aided significantly by oral argument.

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JURISDICTIONAL STATEMENT

This appeal is from the judgment issued by Chief Judge Daniel L. Hovland, United States District Judge for the District of North Dakota, on March 27, 2018. The district court had jurisdiction under 28 U.S.C. § 2255.

Defendant filed a notice of appeal from the district court's judgment on April 26, 2018. This Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT CORRECTLY DETERMINED SILK'S 2013 SIMPLE ASSAULT CONVICTION WAS A PREDICATE PRIOR CONVICTION UNDER 18 U.S.C. § 117.

1. United States v. Johnson, 860 F.3d 1133 (8th Cir. 2017).
2. United States v. Drapeau, 827 F.3d 773 (8th Cir. 2016).
3. United States v. Harlan, 815 F.3d 1100 (8th Cir. 2016).

II. THE DISTRICT COURT PROPERLY DETERMINED SILK'S CLAIM WAS PROCEDURALLY BARRED.

1. Anderson v. United States, 25 F.3d 704 (8th Cir. 1993).
2. McKay v. United States, 657 F.3d 1190 (11th Cir. 2011).
3. Davies v. United States, 411 U.S. 233 (1973).
4. Murray v. Carrier, 477 U.S. 478, 488 (1986).

STATEMENT OF THE CASE

On July 12, 2014, a domestic disturbance call was received by Bureau of Indian Affairs law enforcement on the Standing Rock Indian Reservation. Upon arrival, Bureau of Indian Affairs officers met with the victim and girlfriend of Silk, Violet Miner, who had injuries to her face and back. (Presentence Investigation Report (hereinafter “PSR”) at ¶ 4).¹ Miner told officers that Silk was angry with her and struck her with closed fists, pulled her hair, and slapped her. (Id. at ¶ 5). Silk was located by Bureau of Indian Affairs law enforcement shortly after the assault was reported. (Appellee’s Addendum, pp. A10-A12). After being placed under arrest, Silk admitted that he struck Miner at least once with a backhanded strike to her face. Id.

Silk, having three prior domestic violence convictions (two in the tribal court system and one the state court system), was indicted as a Habitual Domestic Violence Offender by the Grand Jury, pursuant to 18 U.S.C. § 117. The Indictment listed the two tribal domestic violence convictions, but did not further list the state conviction.

¹ The Appellee has requested that the Presentence Investigation Report be sent to the Eighth Circuit Court of Appeals.

At the change of plea hearing, Silk and the United States indicated to the district court that there may be an issue with one of the prior domestic violence convictions listed in the Indictment. (Appellee's Addendum, pp. A2-A5). The parties explained that one of the listed convictions — the July 14, 2014 Standing Rock Tribal Court conviction — involved conduct that preceded the current criminal conduct, but entry of conviction occurred two days after the conduct charged in the Indictment. Id. The parties went on to explain to the court and agree that, regardless of the listed conviction, Silk had an additional conviction, the state court conviction, not listed in the Indictment, that involved the same victim and preceded the conduct related to the instant matter. Id. In context of that discussion, Silk expressly agreed with the United States that two prior qualifying domestic violence convictions supported his Indictment as a Habitual Domestic Violence Offender. Id.

The court went on to discuss with Silk, in detail, the provisions contained within the parties' plea agreement. The court discussed the penalties involved and reviewed Silk's rights, as outlined in paragraph 8 of the agreement. (Appellee's Addendum, pp. A6). In addition, the court outlined what Silk was waiving under the waiver of appeals section of the agreement. (Appellee's Addendum, pp. A7-A9). Finally, the court discussed the factual basis in the plea agreement, which

Silk agreed was sufficient — taking into full consideration the express agreement of the parties described for the court just moments earlier in which the parties agreed the factual basis was correct or in the alternative, there still existed two prior predicate offenses to support the conviction — and which was augmented by the parties’ further offering. (Appellee’s Addendum, pp. A9-A12). There were no issues of concern raised at the change of plea hearing on the matter.

Silk was sentenced on June 29, 2015. During the sentencing, neither party had an objection to the PSR. (Appellee’s Addendum, pp. A14).

During the United States’ sentence recommendation, the prosecutor discussed the numerous prior convictions of Silk, including the fact that Silk had three prior domestic violence convictions. (Appellee’s Addendum, pp. A14-A16). Silk did not object to the PSR findings — which included the state court conviction along with the two tribal convictions — or the prosecutor’s comments reflecting the three prior offenses. Id. Neither Silk nor his counsel raised any concerns or objections during the sentencing phase of the matter. The court imposed a sentence of 37 months imprisonment — the low-end of the guidelines range. (Appellee’s Addendum, pp. A17-A18). Silk did not appeal his conviction or sentence.

On March 28, 2016, Silk filed a pro se motion to dismiss the Indictment and vacate his sentence. The United States filed a response to the motion and on November 9, 2016, the district court denied Silk's motion. Silk filed an appeal on December 5, 2016, which resulted in the matter being remanded to the district court for the court to determine if Silk's claim was indeed procedurally barred from being litigated in a § 2255 motion. Additionally, the district court was requested to determine if in fact a second qualifying conviction supported the judgment in this matter.

Upon remand, the parties filed supplemental briefs to the district court responding to the issues raised by the Eighth Circuit Court of Appeals. (Appellant's Addendum at App. 7, pp. 31-44; and App. 8, pp 45-60). The district court filed an opinion, again denying Silk's motion, on March 27, 2018. (Appellant's Addendum at App. 9, pp. 61-74).

SUMMARY OF THE ARGUMENT

I.

Silk's claim that a court must apply the categorical approach for predicate offenses relevant to Habitual Domestic Violence is impractical and absurd. First and foremost, a plain language reading of 18 U.S.C. § 117 indicates that Congress was not limiting the implementation of this section of law to only predicate prior offenses that involved elements specific to domestic violence. Rather, the plain language of the law requires review of the underlying conduct supporting the conviction to determine if the conduct, under federal law, would be an assault and one which involved a spouse or intimate partner. Along those lines, this Court has established that in order to support a conviction under 18 U.S.C. § 117, the United States must prove that a defendant: 1) committed a domestic assault, 2) that the assault occurred in Indian Country, 3) that the defendant had at least two prior convictions, 4) that the prior convictions involved conduct that would be considered "any assault" under federal law, and 5) that the prior convictions were committed against a person that would be considered a spouse or intimate partner. United States v. Johnson, 860 F.3d 1133, 1141-1143 (8th Cir. 2017); United States v. Drapeau, 827 F.3d 773, 776 (8th Cir. 2016). Elements 3, 4, and 5, in a contested matter, could not be proven beyond a reasonable doubt at trial without the United

States eliciting testimony or evidence to prove the convictions exist, that the conduct itself amounts to conduct sufficient to be “any assault” under federal law, and that the victim of the crime was in fact a spouse or intimate partner.

II.

Silk failed to properly preserve, in any manner, or raise on direct appeal the issue of defect in the Indictment, which pursuant to Rule 12(b)(3) can only be raised prior to trial or conviction. Silk’s failure to properly raise the issue prior to conviction or on direct appeal results in a procedural defect that now bars him from raising the issue under 28 U.S.C. § 2255. Silk has failed to show cause or prejudice as to why he failed to properly raise the claim. Finally, Silk fails to show “actual innocence” as an alternative to remedy the procedural defect. The district court properly assessed that Silk was, and is, procedurally barred from raising the issue of defect in a § 2255 motion for relief.

ARGUMENT

I. The district court correctly determined Silk's 2013 Simple Assault conviction was a predicate prior conviction under 18 U.S.C. § 117.

A. Standard of Review

This Court generally reviews denials of § 2255 motions under the de novo standard, but applies the clear error standard to factual determinations made by the district court. See Davis v. United States, 673 F.3d 849, 852 (8th Cir. 2012) (citing United States v. Hernandez, 436 F.3d 851, 854-55 (8th Cir. 2006)).

B. Argument

On remand the district court was provided two specific tasks by this Court, one of which was to determine if in fact a second qualifying predicate prior offense existed in Silk's criminal history. To that end, the district court allowed the parties to file briefs to supplement the original § 2255 motion.

After supplemental briefing, the district court properly determined that Silk's criminal history included four assault convictions that involved a spouse or intimate partner.² Of the four assault convictions, the court determined that two of the convictions did not qualify as prior offenses. (Appellant's Addendum at App.

² The district court noted in its decision denying Silk's § 2255 motion that V.M., the individual identified as the victim in the Habitual Domestic Violence Indictment, was the undisputed victim of each of the four prior assaults that resulted in conviction. (Appellant's Addendum at App. 9, pp. 70-73).

9, pp. 71-73). These two offenses were in fact assaults involving a person in a domestic relationship with Silk. However, the convictions themselves were not obtained until after the criminal conduct occurred in the underlying matter. (Id.)

One of the prior convictions – the 2011 Domestic Abuse conviction in the Standing Rock Tribal Court, criminal case number 11-35063, conviction date November 7, 2011 – was undisputed by the parties and determined by the court to be a qualifying prior domestic assault conviction. (Appellant’s Addendum at App. 9, p. 71).

The court then turned its attention to the Simple Assault conviction from the Bismarck Municipal Court, Case No. BI-2013-CR-1124, with a conviction date of April 4, 2013, to determine if this prior conviction qualified under 18 U.S.C. § 117. (Appellant’s Addendum at App. 9, pp. 61-73). The court was aided in its determination in having received, as attached exhibits to the supplemental brief of the United States, the police reports involved in this prior offense. (Appellant’s Addendum at App. 9, pp. 37-41). The police report outlined the conduct that resulted in Silk’s conviction, which included the officers noting facial injuries to V.M., that a witness indicated that Silk assaulted V.M., and that Silk, himself, indicated to the officers that V.M. was a person with whom he shared children in common. (Id.) The report further indicated that Silk was taken into custody for

domestic assault. (Id.) Given the underlying circumstances resulting in the simple assault conviction, the district court determined that the incident involved an assault of a person that was a spouse or intimate partner of Silk and was thus a qualifying prior offense. (Appellant's Addendum at App. 9, pp. 72-73).

Silk now challenges the district court's determination that the 2013 Simple Assault conviction is a prior qualifying conviction by suggesting a district court should be restricted to using the categorical approach in reviewing prior convictions for consideration under 18 U.S.C. § 117. Silk opines that, since the courts have already determined that the categorical approach is appropriate for matters involving 18 U.S.C. § 922(g)(9), then the same approach should be used in reviewing prior convictions under § 117. Silk completely disregards the vastly different language Congress selected to use in enacting § 117 as well as Eighth Circuit case law.

A plain language reading of 18 U.S.C. § 117 indicates that Congress was not limiting the implementation of this section of law to only predicate prior offenses that involved elements specific to domestic violence. Rather, the plain language of the law requires review of the underlying conduct supporting the conviction to determine if the conduct, under federal law, would be an assault and one which involved a spouse or intimate partner.

The pertinent parts of 18 U.S.C. § 117 reads as follows:

Any person who commits a domestic assault within...Indian country and who has a final conviction on at least 2 separate prior occasions...for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner...

While this section of law has not been heavily litigated in this Circuit, this Court has established that, in order to support a conviction under 18 U.S.C. § 117, the United States must prove that a defendant **1) committed a domestic assault, 2) that the assault occurred in Indian Country, 3) that the defendant had at least two prior convictions, 4) that the prior convictions were for offenses that would be considered “any assault” under federal law, and 5) that the prior convictions were committed against a person that would be considered a spouse or intimate partner.** See United States v. Johnson, 860 F.3d 1133, 1141-1143 (8th Cir. 2017); United States v. Drapeau, 827 F.3d 773, 776 (8th Cir. 2016).³

Based upon the four elements identified by this Court, as well as the Indian country element, the United States would be required to present evidence to prove the aforementioned elements. It is clear from the elements identified by this Court

³ Emphasis is added to denote the four elements this Court has specifically referenced in Drapeau and Johnson.

that the United States would have to prove to a jury that the underlying offense(s) involved conduct that would be “any assault” under federal law. Elements 3, 4, and 5, in a contested matter, could not be proven beyond a reasonable doubt at trial without the United States eliciting testimony or evidence to prove the convictions exist, that the conduct itself amounted to conduct sufficient to be “any assault” under federal law, and that the victim of the crime was in fact a spouse or intimate partner.

Silk relies on cases dealing with convictions under 18 U.S.C. § 922(g)(9). As mentioned above, there is little case law addressing Section 117. One case that does is Drapeau in which the Eighth Circuit endorsed consideration of the facts underlying a tribal conviction to determine that the United States proved the § 117 elements. The Drapeau court affirmed the district court’s admission of victim testimony from the underlying tribal domestic assaults as to the facts of those assault to prove various § 117 elements. Id. at 776-77

This Court has previously affirmed the submission of evidence to support a prior conviction involving the use of a tribal “Simple Assault” conviction as one of the predicate offenses under § 117. See United States v. Harlan, 815 F.3d 1100, 1105-1106 (8th Cir. 2016). The Court primarily focused on the statutory language of “any assault” in so confirming the introduction of evidence to prove the prior

tribal simple assault qualified as a predicate prior conviction. Id. Similarly, the district court, in this matter, properly reviewed evidence of the underlying conduct in determining the simple assault conviction did indeed qualify as one of the two required predicate convictions.

Silk's argument that the language of § 117 is similar to the language contained in § 922(g)(9) is incorrect. A simple comparison of the language in both sections indicates that Congress' intent in § 117 was clearly meant to be more inclusive and fact dependent. The language Congress used in § 117 reads:

Any person...who has a final conviction on at least 2 separate prior occasions...for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner...

In comparison, the language Congress used in § 922(g)(9) states:

It shall be unlawful for any person – (9) who has been convicted in any court of a misdemeanor crime of domestic violence – to...possess in or affecting commerce, any firearm or ammunition;

To further lend support to this argument, Congress included the language “a final conviction on at least 2 separate prior occasions...for offenses” in § 117 that would, if under federal jurisdiction, amount to “any assault...against a spouse or intimate partner...”

Congress was very specific in § 922(g)(9) by including only “misdemeanor crimes of domestic violence.” Whereas in § 117 Congress specifically, and broadly, opened the gates of inclusion for all “final conviction[s] on at least **2 separate prior occasions...for offenses that would be**, if subject to Federal jurisdiction—**(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner.**” (emphasis added). According to the general canons of statutory interpretation, when Congress includes language in one statute, but omits it from another then the courts will presume “Congress intended a difference in meaning.” See Loughrin v. United States, 134 S.Ct. 2384, 2390 (2014).

Imposing the categorical approach to § 117 would effectively limit the use of prior convictions, as predicates, to only those prior offenses that include an element of domestic violence, which would clearly run afoul of Congress’ apparent intent of allowing a broad review of the underlying conduct of a prior conviction to determine if such conduct would amount to “any assault, sexual abuse, or serious violent felony against a spouse or intimate partner.”

The district court correctly declined to review the 2013 Simple Assault conviction under the categorical approach and having reviewed the conduct underlying the 2013 conviction properly determined that Silk’s conduct would have amounted to an as “assault” on an “intimate partner” if it had occurred under

federal jurisdiction. Because the district court's factual determination was proper and devoid of error, let alone clear error, this Court should affirm the denial of Silk's § 2255 motion.

II. The district court properly determined Silk's claim was procedurally barred.

A. Standard of Review

A district court's finding that a claim is procedurally barred is reviewed de novo. Roundtree v. United States, 885 F.3d 1095, 1097 (8th Cir. 2018).

B. Argument

The district court determined that Silk failed to preserve his claim or properly raise it upon direct appeal. In doing so the court noted that:

A defendant's failure to raise an issue on direct appeal constitutes a procedural defect barring him from raising it for the first time in a Section 2255 motion, and this rule applies equally when the conviction was entered pursuant to a guilty plea. Matthews v. United States, 114 F.3d 112, 113 (8th Cir. 1997). A court reviewing a Section 2255 motion may consider those arguments not properly preserved at trial or on direct appeal only if the petitioner can show either (1) cause for the failure to preserve the claim and prejudice from the claimed legal error, or (2) actual innocence. Bousley v. United States, 523 U.S. 614, 622 (1998); Lindsey v. United States, 615 F.3d 998, 1000 (8th Cir. 2010); United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001).

Silk failed to challenge the adequacy of the predicate convictions at sentencing or on direct appeal. Instead, Silk filed a Section 2255 motion, asserting for the first time that one of the prior convictions listed in the indictment was not "final." See

Docket No. 38. The Court finds Silk has failed to demonstrate “cause” or prejudice for his failure to raise the claim on direct appeal because Silk’s belated claim of actual innocence was available at the time of his guilty plea. See Dejan v. United States, 208 F.3d 682, 685 (8th Cir. 2000).

(Appellant’s Addendum at App. 9, pp. 69) After finding that Silk failed to show cause or prejudice, the court went on to review, and reject, Silk’s claim of innocence. (Appellant’s Addendum at App. 9, pp. 69-70). The district court correctly found Silk was procedurally barred from raising his challenge to the indictment.

28 U.S.C. § 2255(a) authorizes a defendant who was convicted in federal court to challenge his conviction or sentence claiming:

the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

A motion under § 2255 is not a substitute for direct appeal and, as such, not all errors can be litigated in such a motion. Jennings v. United States 696 F.3d 759, 762 (8th Cir. 2012) Auman v. United States, 67 F.3d 157, 161 (8th Cir. 1995).

Non-constitutional and non-jurisdictional claims are not cognizable in a § 2255 motion, Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1993). With respect to constitutional and jurisdictional errors that could have been raised in the district

court or direct appeal, a defendant may not raise such issues unless he can show cause and prejudice for the procedural default, or a miscarriage of justice – that he is actually innocent. Jennings, 696 F.3d at 763; Anderson, 25 F.3d at 706.

In its opinion on February 23, 2018, this court construed Silk's claim as follows:

that he could not, as a matter of law, have committed the crime to which he pleaded guilty, domestic assault as a habitual offender, in violation of 18 U.S.C. § 117.

Silk v. United States, 712 Fed. Appx 586 (8th Cir. 2018). His claim was based upon the belief he did not have a second qualifying predicate offense identified in the indictment.

This claim is essentially the same as that in Anderson. In Anderson, the defendant claimed he could not be guilty of being a felon-in-possession of a firearm. He argued his underlying convictions did not qualify as predicate convictions under 18 U.S.C. § 922(g)(1) because his civil rights had been restored. This Court found the claim did not raise a constitutional or jurisdictional claim and, as such, was not cognizable in a 2255 motion. 25 F.3d at 706.

Silk is raising a very similar claim – that he could not be convicted under 18 U.S.C. § 117 because he did not have a second qualifying prior offense. As in

Anderson, this claim is not a constitutional or jurisdictional claim and is not cognizable in a 2255 proceeding.

Even if Silk's claim is considered a constitutional or jurisdiction claim, he is procedurally barred from raising the issue in a 2255 proceeding unless he can show (1) cause for his failure to raise the issue in the trial court or on direct appeal, and prejudice; or (2) actual innocence. Roundtree, 885 F.3d at 1097-98; Jennings, 696 F.3d at 763. In order to establish cause for the procedural default for errors that were not raised before the district court or on appeal, a defendant must show that some objective external factor impeded the defense from raising the issue. Murray v. Carrier, 477 U.S. 478, 488 (1986); Greer v. Minnesota, 493 F.3d 952, 957 (8th Cir. 2007). Prejudice requires a showing that the error complained of worked to the defendant's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." Murray, 477 U.S. at 488; Johnson v. United States, 278 F.3d 839, 844 (8th Cir. 2002).

The district court correctly found Silk had not established cause and prejudice for failing to raise the issue before the district court or on appeal. He made no showing to the district court that an external factor prevented him from raising the issue to the district court or on appeal.

The district court was also correct in finding Silk failed to establish the actual innocence exception to his procedural bar. The actual innocence exception “means factual innocence, not mere legal insufficiency” or legal innocence Bousley v. United States, 523 U.S. 614, 623 (1998); Anderson, 25 F.3d at 707.

In his 2255 motion, Silk argued one of the prior convictions in listed in the indictment could not be used as a predicate offense because it was the same act for which he was charged as a habitual offender and that it was not a final conviction. Silk’s claim in this appeal focuses on the manner in which the district court determined whether Silk had a prior second predicate conviction under Section 117; that is, whether it was error to consider the underlying facts of the conviction, rather than applying the categorical approach.

Silk does not deny he was convicted of the 2013 Simple Assault or that he committed the instant assault leading to his conviction. In fact, at the change of plea hearing, it was determined, and agreed upon, that the 2013 simple assault conviction qualified as a predicate offense. (Appellee’s Addendum, pp. A2-A5) This claim is one of legal innocence rather than actual innocence. Id. at 707 (assertion that Section 922(g)(1) did not apply because defendant did not have two qualifying convictions within meaning of the statute was claim of legal innocence rather than factual innocence); See McKay v. United States, 657 F.3d 1190, 1199

(11th Cir. 2011)(claim by defendant that he was innocent of career offender sentence because prior conviction was not crime of violence was not claim of factual innocence of offense where defendant did not even suggest he did not commit prior conviction). The district court properly held Silk failed to meet the actual innocence exception to his procedural default.

Furthermore, because the United States could prove, beyond a reasonable doubt, that Silk obtained two prior convictions that, if subject to federal jurisdiction, were convictions based upon domestic violence, at best Silk could raise only an issue regarding a defect in the Indictment. Per Davies v. United States, 411 U.S. 233 (1973), Silk cannot collaterally attack his conviction some three years later based upon a Rule 12(b)(3) issue that could only be raised prior to trial or conviction.

Because Silk failed to show cause and prejudice or actual innocence, the court determined properly that Silk's claims were procedurally barred from being raised in a § 2255 motion. Furthermore, Silk's agreement at the change of plea hearing that at least two of his prior convictions qualified as prior convictions further supports the finding he was procedurally barred from raising his claim. The district court's finding on this ground should be affirmed.

CONCLUSION

The district court's determinations on both issues remanded to the district court should be affirmed. First, the district court was correct in finding Silk was procedurally barred from raising his claim in a 2255 motion. Second, the district court properly found Silk's 2013 Simple Assault conviction qualified under 18 U.S.C. § 117. The United States respectfully request this Court affirm the district court's denial of Silk's § 2255 motion in total.

Dated: September 14, 2018.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

The undersigned hereby certifies that this brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) in that the number of words contained in this brief is 4,444, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman size 14 font.

Pursuant to 8th Cir. R. 28A(h), I further certify that the brief and any accompanying addendum have been scanned for viruses and is virus-free.

Dated: September 14, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that an electronic copy of this brief has been submitted for review and approval on September 14, 2018, to the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

I certify that all participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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