ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE ex rel. MARK MATLOFF, DISTRICT ATTORNEY, ***Petitioner,*** ***-vs-*** **THE HONORABLE JANA WALLACE, DISTRICT JUDGE,** ***Respondent.***	**Case No. PR-2021-366**

AMICUS CURIAE BRIEF OF THE CAPITAL HABEAS UNIT OF THE FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF OKLAHOMA IN SUPPORT OF RESPONDENT

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Petitioner,	)	
v.	)	**Case No. PR-2021-366**
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On May 21, 2021, this Court ordered Petitioner Mark Matloff and Attorney Debra K. Hampton, post-conviction counsel for party-in-interest Clifton Parish, to submit briefs addressing the following question:

> In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. __ (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was final when *McGirt* and *Sizemore* were announced?

Amicus curiae, the Capital Habeas Unit of the Federal Public Defender for the Western District of Oklahoma ("CHU-FPD"), appears solely to establish that Respondent, Associate District Judge Jana Wallace, correctly applied *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), in *State v. Parish*, to conclude the Choctaw Nation Reservation has not been disestablished. *State v. Parish*, Pushmataha County Case No. CF-2010-26, Order (Apr. 13, 2021). Respondent was correct in finding the State of Oklahoma lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act, 18 U.S.C. § 1153, because *McGirt* can be applied retroactively to void a state conviction

that was final when *McGirt* was announced.[1]

ARGUMENT

I. *McGIRT* IS RETROACTIVELY APPLICABLE TO VOID A STATE CONVICTION THAT WAS FINAL WHEN *McGIRT* WAS ANNOUNCED.

The recent recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* should be applied retroactively to void a state conviction that was final when those decisions were announced. Based on an accurate interpretation of the rules governing retroactivity, the State of Oklahoma has repeatedly argued *McGirt* did *not* announce a new constitutional rule of criminal procedure. *See infra* Section B. As a result, under this Court's jurisprudence, there is no bar to its retroactive application to cases on collateral review.

Teague v. Lane, 489 U.S. 288 (1989), *overruled in part by Edwards v. Vannoy*, 593 U.S. __, 141 S. Ct. 1547 (2021), remains the bedrock Supreme Court decision on the mandated retroactivity of new, substantive rules of federal constitutional law. *Teague* was concerned with the rules for the relatively small category of new decisions that state courts *must* apply retroactively.

> [W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague*'s first exception for substantive rules [].

Montgomery v. Louisiana, 577 U.S. 190, 200 (2016). As with any constitutional rule, beyond this carve-out of mandatory protection, states are free to govern as they see fit. *See, e.g., State v.*

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[1]In *Sizemore v. State*, 2021 OK CR 6, this Court, applying *McGirt* on state direct appeal, held Congress has never disestablished the Choctaw Reservation. *Id.* at ¶¶ 13-16. The principles supporting the retroactive applicability of *McGirt*, discussed *infra*, apply with equal force to *Sizemore*.

Santiago, 492 P.2d 657, 665 (Haw. 1971) ("Nothing prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution."). States can choose whether to give any new state or federal rule retroactive effect. The highest criminal courts of many states have issued their own retroactivity laws. Such laws are not implicated by *Teague* except where, as *Montgomery* explained, "constitutional commands" are at issue. *See, e.g., Witt v. State*, 387 So.2d 922, 926 (Fla. 1980) (announcing "essential considerations" for whether new decision has retroactive state effect); *Phillips v. State*, 299 So.3d 1013, 1021-22 (Fla. 2020) (analyzing whether Supreme Court intellectual disability ruling requires retroactive effect under either *Witt* or *Teague*). *See also Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113 (1995) (this Court's application of *Teague*, see *infra* Section A). Under any principle or law of retroactivity, *McGirt* did not announce a new rule and has no place within this analytical framework.

A. The Principles of *Teague* and Its Progeny, as Well as *McGirt* Itself, Establish *McGirt* Did Not Announce a New Rule; Thus, *McGirt* Retroactively Applies to Cases with Final Convictions on State Collateral Review.

The retroactivity of the Supreme Court's criminal procedure decisions to cases on collateral review depends on whether such decisions announce a new rule. *Teague*, 489 U.S. at 301. When the Supreme Court announces a new constitutional rule of criminal procedure, a person whose conviction is already final may not benefit from that decision in a habeas proceeding. *Chaidez v. United States*, 568 U.S. 342, 347 (2013). "[A] case announces a new rule," *Teague* explained, "when it breaks new ground or imposes a new obligation" on the government.[2] *See also Walker v. State*,

[2] *Teague* included two exceptions: "[W]atershed rules of criminal procedure" and rules placing "conduct beyond the power of the [government] to proscribe." *Teague*, 489 U.S. at 311-12. *Edwards v. Vannoy* explicitly overruled *Teague*'s watershed rule exception. 593 U.S. __, 141 S. Ct.

1997 OK CR 3, ¶38, 933 P.2d 327, 338."*Teague* also made clear that a case does *not* 'announce a new rule, [when] it [is] merely an application of the principle that governed' a prior decision to a different set of facts." *Chaidez*, 568 U.S. at 347-48 (quoting *Teague*, 489 U.S. at 307). "'Where the beginning point'" of the Court's analysis is a rule of "'general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.'" *Chaidez*, 568 U.S. at 348 (quoting *Wright v. West*, 505 U.S. 277, 309 (1992)). The most obvious example of a decision announcing a new rule is a decision that overrules an earlier case. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). If the rule is not new, a petitioner may "avail herself of the decision on collateral review." *Chaidez*, 568 U.S. at 347.

In *McGirt* and *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom, Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (*per curiam*), the Supreme Court and the Tenth Circuit Court of Appeals made clear neither case broke new ground sufficient to trigger a *Teague* bar. In *Murphy*, the Tenth Circuit held Congress has not disestablished the Creek Reservation. 875 F.3d at 937. The court dispelled any notion this holding was subject to a *Teague* bar:

> Mr. Murphy has no need for *Teague*'s exceptions because he does not seek the benefit of a rule that falls within *Teague*'s retroactivity bar. The post-2003 cases we discuss in our de novo analysis are applications of the *Solem* [*v. Bartlett*, 465 U.S. 463 (1984)] framework.

Id. at 930 n.36.

Likewise, the Supreme Court was equally clear *McGirt* did not announce a new constitutional rule of criminal procedure when it held Congress has not disestablished the Creek Reservation.

1547, 1560 (2021) (holding the "watershed exception is moribund").

Applying *Solem* and other precedent, *McGirt* did nothing more than clarify the framework for determining whether a reservation has been disestablished and, applying this framework, determined the Creek Reservation remained Indian country for purposes of the Major Crimes Act. *See Oneida v. Village of Hobart*, 968 F.3d 664, 668 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.").

The recent Supreme Court case *Edwards v. Vannoy* further supports the position *McGirt* did not announce a new rule thereby making the *Teague* framework irrelevant. In *Edwards*, the Supreme Court determined *Ramos v. Louisiana*, 590 U.S. __,140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), which held a state jury must be unanimous to convict a criminal defendant of a serious offense, announced a new constitutional rule of criminal procedure and did not apply retroactively on federal collateral review. *Edwards*, 141 S. Ct. at 1555. In concluding *Ramos* announced a new rule, the Court in *Edwards* reasoned *Ramos*'s jury-unanimity requirement was not dictated by precedent and many courts had interpreted a prior decision, *Apodaca v. Oregon*, 406 U.S. 404 (1972), to permit non-unanimous jury verdicts in state criminal trials. *Edwards*, 141 S. Ct. at 1556. Contrary to *Ramos*, which the *Edwards* Court found was not dictated by precedent, *id.* at 1555-56, *McGirt* simply clarified the existing *Solem* framework to determine the Creek Reservation had not been disestablished. *See Onieida,* 968 F.3d at 668. Further, in concluding the Creek Reservation remained Indian country, *McGirt* did not renounce Supreme Court precedent as in *Ramos*. *See Edwards*, 141 S. Ct. at 1556 ("By renouncing *Apodaca* and expressly requiring unanimous jury verdicts in state criminal trials, *Ramos* plainly announced a new rule for purposes of this Court's retroactivity doctrine.").

United States v. Cuch, 79 F.3d 987 (10th Cir. 1996) also shows *McGirt* did not announce a new constitutional rule of criminal procedure. *Cuch* addressed the retroactive applicability of *Hagen v. Utah*, 510 U.S. 399 (1994), which held the state of Utah had jurisdiction to prosecute Mr. Hagen because Congress had diminished the Uintah Reservation in the early 1900s. *Cuch*, 79 F.3d at 989. In reaching its decision in *Hagen*, the Supreme Court "effectively overruled the contrary conclusion reached in its [*Utah v.*] *Ute Indian Tribe* [, 479 U.S. 994 (1986] case." Reasoning the *Hagen* decision "was not dictated by precedent existing at [that] time," *Cuch* concluded *Hagen*'s "holding should not provide the basis for a collateral attack." *Cuch*, 79 F.3d at 991.[3] Unlike *Hagen*, *McGirt* did not "effectively overrule" any existing precedent of the Supreme Court to conclude the Creek Reservation had not been disestablished. Instead, *McGirt* faithfully applied existing precedent while simultaneously clarifying the *Solem* analysis. *McGirt*, 140 S. Ct. at 2464-65, 2468-69.[4]

While *Teague* and its progeny can only act to bar federal collateral review, in the state context, "[t]his Court has cited with approval [*Teague*'s] precepts" in "determining exactly when a decision constitutes a change in the law." *Ferrell v. State*, 1995 OK CR 54, ¶5, 902 P.2d 1113, 1114.

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[3]*Cuch* also recognized "The Supreme Court can and does limit the retroactive application of subject matter jurisdiction rulings." *Cuch*, 79 F.3d at 990. Nevertheless, the Tenth Circuit's analysis of the retroactive application of subject matter jurisdiction rulings still turned on whether such rulings announce new rules. *Id.* at 990-91 (applying *Teague* framework). Post-*Teague*, the Supreme Court has never found that a subject matter jurisdictional ruling falls within the ambit of a constitutional rule of criminal procedure. *See also Murphy,* 875 F.3d at 929 n.36 (noting if a case is not "new," there is no need to determine whether a rule resulting therefrom qualifies as "constitutional" or "procedural" under *Teague*).

[4]Further, in *Hagen* the defendant's conviction was not final. The Supreme Court granted certiorari review from the Utah Supreme Court's reinstatement of the defendant's conviction after the Utah Court of Appeals reversed the trial court's denial of defendant's motion to withdraw his guilty plea on the ground the state court lacked jurisdiction. 510 U.S. at 408-09. In contrast, in *McGirt* and *Murphy* the Supreme Court granted certiorari review and relief, despite both cases involving final convictions on collateral review.

Under *Ferrell*, as under *Teague*, any attempt to prevent *McGirt* from taking retroactive effect fails at the threshold. *McGirt* did not announce the new rule of law necessary to render such analysis applicable. In *Ferrell*, this Court found the state law at issue "was not dictated by existing precedent" and therefore announced a new rule. 902 P.2d at 1114. As the State has continuously argued, *McGirt* was dictated by precedent and did not break new ground. *See McGirt*, 140 S. Ct. at 2464; *see infra* Section B. *Ferrell* demonstrates that *McGirt* did not announce a new constitutional rule of criminal procedure. It subsequently cannot be held non-retroactive under this line of precedent.

B. The State Has Repeatedly and Consistently Asserted *McGirt* Is Not New for the Purposes of *Teague*.

In a series of briefings spanning several cases, the State has repeatedly urged this Court to find state prisoners' *McGirt* claims waived. Often citing *Teague* for the proposition, the State has forcefully argued *McGirt* does not, and cannot, represent "new law." Any attempt to now advance the opposite position should not be countenanced.

Soon after *McGirt* was handed down, the State began lodging what it clearly viewed as one of its central procedural defenses against collateral *McGirt* relief: such claims did not arise under new law and therefore had been waived under state statute.[5] *See* Resp. to Pet'r's Proposition I in

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[5]The cases discussed below involve application of Okla. Stat. tit. 22, § 1089, the capital post-conviction statute. Specifically, § 1089(D)(8) permits subsequent applications for post-conviction relief when the legal basis for the claim was unavailable. Under § 1089(D)(9)(a)-(b), a legal basis for a claim is unavailable if the legal basis:

> a. was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or
> b. is a new rule of constitutional law that was given retroactive effect of the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.

Although § 1089 does not apply to non-capital cases, the State's repeated argument that *McGirt* did not announce a new rule is relevant here.

Light of the Supreme Court's Decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) at 25-27, *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, No. PCD-2019-124 (Aug. 4, 2020) (hereinafter "*Bosse* Response"). The State sought to ground this argument in the language and reasoning of *McGirt* itself, where the Court characterized its opinion as "say[ing] nothing new" and traced the long line of treaties and cases it had applied to reject disestablishment. Similarly, the State pointed to *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), as a decision recognizing that it "broke no new ground." *Bosse* Response at 26. The State noted the Tenth Circuit had found the petitioner's claim "not *Teague*-barred," as it was not new, but rather, an application of prior case law. *Bosse* Response at 26, citing *Murphy*, 875 F.3d at 930 n.36. The State described the pertinent holding of *Teague* as distinguishing between new rules, which are subject to a collateral review bar, and those applying a prior precedent, which are by definition not new. *Bosse* Response at 26 n.17.

Following district court remand proceedings in Mr. Bosse's case, the State doubled down on its argument that, as *McGirt* did not present a new ground for relief, the claim should be procedurally barred as untimely. *See* State's Supplemental Br. Following Remand For Evidentiary Hr'g at 17-19, *Bosse v. State* (Nov. 4, 2020) (hereinafter "*Bosse* Post-Hearing Brief"). The State listed a number of decisions on the reservation disestablishment issue from the Supreme Court and this Court to demonstrate "[j]urisdictional claims such as the petitioner's were available long prior to *McGirt*." *Bosse* Post-Hearing Brief at 17-18.[6]

The State went on to invoke *Teague*, and this Court's reliance on *Teague* in discussing when

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[6]One of the citations the State included among the "number of cases in which the Supreme Court has considered such claims in the decades preceding *McGirt*," *Hagen v. Utah*, 510 U.S. 399 (1994), was the decision the Tenth Circuit held non-retroactive in *Cuch*, as discussed *supra*, Section A. *Cuch* based this holding on its conclusion that *Hagen* "'was not dictated by precedent existing at [that] time.'" 79 F.3d at 991 (quoting *Teague*).

a case should be viewed as announcing a new rule in *Walker v. State*, 1997 OK CR 3, ¶38, 933 P.2d 327, 338, in post-remand briefs before this Court in several cases. In addition to arguing that *McGirt* claims could have been formulated previously and therefore do not meet the Okla. Stat. tit. 22 , § 1089(D)(9)(a) exception, the briefing uniformly relied on *Teague* and *Walker* to argue that *McGirt* was not the new constitutional law needed to satisfy § 1089(D)(9)(b). *See* Supplemental Br. of Resp't After Remand at 13-14, *Ryder v. State*, 2021 OK CR 11, No. PCD-2020-613, 2021 WL 1727017 (Nov. 23, 2020); Supplemental Br. of Resp't After Remand at 16-18, *Cole v. State*, 2021 OK CR 10, No. PCD-2020-529 (Dec. 8, 2020); Supplemental Br. of Resp't After Remand at 7-8, *Goode v. State*, No. PCD-2020-530 (Dec. 22, 2020). This Court has granted relief in several of these cases under § 1089(D)(9)(a) with such arguments already before it. In granting post-conviction relief to Mr. Bosse, the Court noted the State had argued "that waiver should apply because there is really nothing new about the claim." *Bosse*, 2021 OK CR 3, ¶20 n.8, 484 P.3d at 293 n.8.[7]

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[7]While this Court rejected the State's argument that waiver should apply to Mr. Bosse's *McGirt* claim because he could not satisfy the § 1089(D)(9)(b) exception, it simultaneously emphasized why Mr. Bosse satisfied the § 1089(D)(9)(a) exception: "[A]lthough similar claims may have been raised in the past in other cases, the primacy of State jurisdiction was considered settled and those claims had not been expected to prevail. The legal basis for this claim was unavailable under Section 1089(D)." *Bosse*, 2021 OK CR 3, ¶20 n.8, 484 P.3d at 293 n.8.

The State's argument in a separate case also supports this Court's finding the legal basis for *McGirt* claims was previously unavailable. In *Deerleader v. Crow*, No. 20-CV-172 (N.D. Okla. Dec. 14, 2020), the petitioner filed an application for post-conviction relief before the Supreme Court decided *Murphy* and *McGirt*. While the State insisted on federal habeas that "*McGirt* did not establish a new rule or right, and Indian Country claims were previously available," it also argued, "this significant change in Oklahoma's precedent warrants re-exhaustion of Petitioner's *Murphy* claim in the state courts post-*McGirt*." Brief in Support of Motion to Stay Federal Habeas Proceedings for Petitioner to Re-Exhaust His *Murphy* Claim in State Court in Light of the United States Supreme Court's Decision in *McGirt* at 2, 6 n.3, *Deerleader v. Crow*, No. 20-CV-172 (N.D. Okla. Aug. 24, 2020). The State explained:

> At the time the OCCA entertained Petitioner's post-conviction appeal and the *Murphy* claim as raised in Ground Four of his habeas petition, the *Murphy/McGirt* litigation was still pending. Due to the pending litigation, although the OCCA

In each of the above cases, the State also attempted to file additional supplemental briefs bringing *In re: David Brian Morgan*, No. 20-6123 (10th Cir. Sept. 18, 2020) to this Court's attention. *See* State's Supplemental Br. Regarding Whether *McGirt* Was Previously Available for Purposes of Barring Claims, *Bosse v. State* (Jan. 7, 2021) (hereinafter "*Bosse* Supplemental Brief); *Cole v. State* (Jan. 21, 2021); *Goode v. State* (Jan. 22, 2021); *Ryder v. State* (Jan. 22, 2021). Pointing to the Tenth Circuit's refusal to allow a *McGirt* claim raised in a second or successive federal habeas petition under 28 U.S.C. § 2244(b)(2)(A), an Anti-Terrorism and Effective Death Penalty Act (AEDPA) provision requiring such petitions be based on a new and explicitly retroactive rule of constitutional law, the State analogized that state collateral relief should therefore be out of *McGirt* petitioners' reach. Quoting *Morgan*'s conclusion that *McGirt* "hardly speaks of a 'new rule of constitutional law,'" the State asserted the Tenth Circuit agreed with *McGirt*'s language of "say[ing] nothing new." *See, e.g.*, *Bosse* Supplemental Brief at 2-3. This Court denied the State permission to raise the "not relevant" authority in *Goode v. State*, *see* Order Den. Mot. to File Supplemental Br. at 2 (Feb. 2, 2021), and in *Ryder*, it found the analysis "inapposite to the jurisdictional issue," noting that the Tenth Circuit's ruling was premised on its finding that *McGirt* did not create new law, but

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> admittedly denied Petitioner's *Murphy* claim on the merits, the claim was governed by the OCCA's previous ruling in *Murphy v. State*, where the OCCA held that the Creek Nation had been disestablished. *See* 124 P.3d 1198, 1207-08 (2005). Although not directly cited below, this holding was binding as a matter of state law on both the state district court and the OCCA unless and until it was overruled by the OCCA or the United States Supreme Court. Now that *McGirt* has been decided, and *Murphy v. State* has been expressly overruled, the OCCA should be afforded a full and fair opportunity to address Petitioner's *Murphy* claim.

Id. at 8-9.

Hence, this Court was correct to find the legal basis of the claim was unavailable in *Bosse* under § 1089(D)(9)(a). In this case, the *Teague* bar has no application. These conclusions are consistent with each other.

rather, "simply interpreted acts of Congress in order to determine if a federal statute applied to a given situation," *Ryder v. State*, 2021 OK CR 11, ¶12 n.3.

The State has continued to rely on *Morgan* in arguing *McGirt* is not new law in subsequent filings, including as recently as weeks prior to the instant Petition for Writ of Prohibition. *See* Supplemental Br. of Resp't After Remand, *Pitts v. State*, No. PC-2020-885, 2021 WL 2006104 at *7, *7 n.4 (Okla. Crim. App. Apr. 6, 2021) (in arguing *McGirt* claims were previously available, calling issue "settled by *Morgan*" under either § 1089(D)(9) exception ground). The current attempt to cite *Morgan* for the proposition that *McGirt* is not retroactive–ignoring the threshold language in both the *Teague* and AEDPA contexts applying the retroactivity question only to *new* rules, as it logically must be–is inherently inconsistent and incorrect. *See* Pet. for Writ of Prohibition, Designation of R., and Req. for Continued Stay Pending Decision at 2, *State ex. rel. Matloff v. the Honorable Jana Wallace*, 2021 OK CR 15, 2021 WL 2069659, No. PR-2021-366 (Apr. 27, 2021).

The State has argued at every opportunity that *McGirt* is not a new rule of constitutional law. It has spent the better part of the past year trying to convince this Court that § 1089(D)(9) should bar successive petitioners' *McGirt* claims, based in part on such claims not being new under *Teague* principles. Any attempt to now rely on *Teague* and its progeny to argue that *McGirt* is a new constitutional law is disingenuous. Based on the State's extensive past briefing on the question, all parties should now be in agreement that *McGirt* did not announce a new constitutional rule. The *Teague* retroactivity framework, which applies only to new rules, therefore by definition has no bearing.

CONCLUSION

Because *McGirt* did not announce a new constitutional rule of criminal procedure, petitioners with final convictions may avail themselves of the decision on state collateral review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2021, a true and correct copy of this filing was mailed to each of the following:

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