STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Hampton County
Perry M. Buckner, Trial Judge
Roger M. Young, Sr., PCR Judge

Appellate Case No. 2024-000375

DANIEL FLUDD,

APPELLANT,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the PCR court erred by finding that because the jury found petitioner guilty of voluntary manslaughter rather than murder, petitioner was not prejudiced by defense counsel's failure to object to the improper jury instruction that malice could be inferred from the use of a deadly weapon when the trial court failed to instruct the jury that malice was not an element of voluntary manslaughter?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Did the PCR court properly find Petitioner did not prove prejudice from the implied malice charge when (1) Petitioner was acquitted of murder—the only offense that required proof of malice, and the overall charge here was different than the charge in Burdette; (2) Petitioner's argument that the trial court erred by not charging the jury that voluntary manslaughter does not include malice is not preserved; and (3) Petitioner has not pointed to a case that existed at the time of trial that requires a court to charge that voluntary manslaughter does not include malice and thus has not met his burden of proving counsel was deficient in this regard?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections serving an aggregate thirty-year sentence. In August 2017, the Hampton County Grand Jury indicted Petitioner for murder (2017-GS-25-00160) and possession of a weapon during a violent crime (2017-GS-25-00161). On December 3-5, 2018, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner. Ian Deysach, Esquire, represented Petitioner, and Assistant Solicitor Tameaka Legette prosecuted the case. The jury acquitted Petitioner of murder but convicted him of the lesser-included offense of voluntary manslaughter and the weapon charge. Judge Buckner sentenced him concurrently to twenty years for voluntary manslaughter and five years for the weapon charge.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender David Alexander. On appeal, Petitioner argued the trial court erred in charging the jury that malice could be inferred from the use of a deadly weapon. The Court of Appeals affirmed, finding this issue was not preserved. State v. Fludd, 2021-UP-165 (S.C. Ct. App. filed May 12, 2021). The remittitur was sent June 4, 2021.

On May 20, 2022, Petitioner timely filed this PCR application. Respondent filed a return requesting an evidentiary hearing. On November 27, 2023, an evidentiary hearing convened before the Honorable Roger M. Young, Sr. Petitioner was present and represented by Chelsey F. Marto, Esquire. Assistant Attorney General Danielle Dixon represented the State. On February 26, 2024, Judge Young issued an Order denying relief and dismissing the application with prejudice.

STATEMENT OF FACTS

At trial, Zaneh Garvin testified she and her boyfriend Bobby Atkins (Victim) were at "Bummy's" house around midnight when they saw Petitioner. She stated Petitioner gave Victim a

gold chain to see if Victim could sell it, but Victim was unable to sell it that night. Garvin stated Petitioner and Victim later began arguing over the necklace, prompting Garvin to tell Victim to give it back. She stated she took the necklace from Victim and returned it to Petitioner. According to Garvin, the two continued to argue; she and Victim ran toward Victim's parents' house, and Petitioner ran after them. Once on his parents' property, Victim picked up a shovel and hit Petitioner. Victim and Petitioner continued fighting, and Petitioner pulled out a knife and stabbed Victim in the stomach. (App. 285-331).

Petitioner provided law enforcement a recorded interview the day after Victim's death, which was played for the jury. In the interview, Petitioner stated he and Victim began arguing after Victim stole his gold chain. (App. 659-60). According to Petitioner, when he confronted Victim, Victim "came with a shovel and tried to hit me." (App. 660). Petitioner attempted to dodge the shovel, but Victim hit him with it. Petitioner admitted he punched Victim in the chin but claimed he did not have a weapon. (App. 663-64). He clarified that Victim hit him twice, breaking the shovel. (App. 671). Petitioner initially stated he began running because Victim said he was going to get a gun. (App. 663-64). Later, however, he told police that he grabbed a broken piece of the shovel and "poked" Victim with it. (App. 689-70).

The pathologist testified Victim had six stab wounds, including a fatal one to the chest. (App. 449, 462). She opined the wounds were likely caused by a knife with a blunt edge and a sharp edge, and it was unlikely the wounds were caused by the shovel or a box cutter that was found at the scene. (App. 458-59). Petitioner did not testify at trial but proceeded on self-defense. The jury acquitted him of murder but convicted him of the lesser-included offense of voluntary manslaughter.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found Petitioner did not prove prejudice from the implied malice charge when (1) Petitioner was acquitted of murder—the only offense that required malice, and the overall charge here is distinguishable from the charge in Burdette; (2) Petitioner's argument that the trial court erred by not charging the jury that voluntary manslaughter does not include malice is not preserved; and (3) Petitioner has not pointed to caselaw that existed at the time of his trial that requires a court to charge that voluntary manslaughter does not include malice and thus has not met his burden of proving deficiency in this regard.

Petitioner's argument centers on the contention that the trial court erroneously failed to charge the jury that voluntary manslaughter does not include malice as an element—an argument that was not even raised to the PCR court and is thus not preserved. (App. Br. 10-13). Petitioner has conceded the trial court properly charged voluntary manslaughter (Pet. 8), and Petitioner does not take any issue with the self-defense charge. Rather, Petitioner focuses on the fact the trial court did not instruct the jury that malice is not an element of voluntary manslaughter, which he contends somehow caused the jury to become so confused that it believed it could not acquit him based on self-defense and instead mistakenly convicted him of voluntary manslaughter. However, Petitioner is conflating the issue of the implied malice charge in the murder charge (which was admittedly improper) with the issue of whether the trial counsel was ineffective for not objecting when the court did not charge that voluntary manslaughter does not include malice (which was not raised to the PCR court and thus is not preserved). Here, the PCR court properly found Petitioner was not prejudiced when he was *acquitted* of murder, and voluntary manslaughter does not include malice—making any erroneous inferred malice charge harmless beyond a reasonable doubt. Further, Petitioner has not pointed to caselaw that existed at the time of trial that requires a voluntary manslaughter charge to include language that it does not include malice in order for the charge to be proper and has thus not met his burden of proving counsel was ineffective in this

regard.[1]

In a PCR action, an applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating claims of ineffective assistance of counsel, courts apply the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," and an applicant must overcome this presumption to receive relief. Id. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove the deficiency prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

[1] As set forth herein, the issue regarding whether counsel was ineffective for not requesting the court charge that voluntary manslaughter does not include malice was not raised to the PCR court or addressed in its order—making it unpreserved. Nonetheless, if this Court is going to entertain this unpreserved argument, it must do so under the context of the law that existed at the time of Petitioner's trial. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." (emphasis added)); Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). Petitioner has failed to point to any law that existed at the time of Petitioner's trial that indicated a court must charge that voluntary manslaughter does not require malice. Thus, counsel cannot be deficient in this regard.

a. The PCR court properly found Petitioner did not prove prejudice from the implied malice charge when Petitioner was acquitted of murder—the only offense that required proof of malice, and the charge here is distinguishable from the charge in Burdette.[2]

The PCR court properly found Petitioner did not prove prejudice from counsel's failure to object to the implied malice charge. The jury convicted Petitioner of voluntary manslaughter, which does not include malice aforethought. Thus, the implied malice charge here did not impact the jury's decision.

At trial, the undisputed evidence showed Petitioner struck Victim with *something* (either a broken shovel, as Petitioner stated, or a knife, as Garvin testified to and the pathologist opined), causing Victim's death. Thus, the primary issue for the jury was whether the State disproved beyond a reasonable doubt that Petitioner was acting in self-defense, or whether the State proved beyond a reasonable doubt that Petitioner was acting with malice aforethought (murder) or in a sudden head of passion upon sufficient legal provocation (voluntary manslaughter). By acquitting Petitioner of murder, the jury determined the State did not prove malice aforethought. Because the jury did not find the State proved malice aforethought, it likewise did not infer malice. Based on the undisputed evidence that Petitioner struck and killed Victim, the absence of a murder

[2] The State concedes it was improper under the law that existed at the time of Petitioner's trial for the trial court to charge that malice could be inferred from the use of a deadly weapon because evidence of mitigation (to voluntary manslaughter) and justification (through self-defense) was presented. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) ("[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.", overruled by State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) ("A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted."). However, the State does NOT concede—and has never conceded (especially since this issue wasn't raised to the PCR court)—that counsel was deficient for not asking the court to charge the jury that malice is not an element of voluntary manslaughter.

conviction is conclusive evidence that the jury did not believe Petitioner acted with malice. Thus, the PCR court properly concluded that Petitioner cannot show prejudice from the trial court's improper inferred malice charge.

Petitioner cites State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), in arguing the inferred malice charge prejudiced him. Burdette, however, is distinguishable because in addition to charging murder and voluntary manslaughter, the Burdette court charged involuntary manslaughter. Id. at 494, 832 S.E.2d at 577. Critically, in charging involuntary manslaughter, the court *twice* charged the jury that malice was not an element of involuntary manslaughter, but it did not offer a similar charge for voluntary manslaughter. Id. at 501, 832 S.E.2d at 581. The presence of a charge instructing that involuntary manslaughter does not include malice influenced the Burdette Court's conclusion:

> *When the trial court instructed the jury that malice was not an element of involuntary manslaughter, but did not instruct the jury that malice was not an element of voluntary manslaughter*, the jury was left with the incorrect impression that malice is an element of voluntary manslaughter, which allowed the jury to use the improperly charged inference of malice from the use of a deadly weapon to find Burdette guilty of voluntary manslaughter.

Id. (emphasis added). Thus, in Burdette, where the jury was affirmatively instructed that involuntary manslaughter did *not* include malice but was not affirmatively instructed that voluntary manslaughter did not include malice, the Court reasoned that the jury may have been confused about whether voluntary manslaughter included malice—thus making the inferred malice charge prejudicial.

Here, unlike Burdette, the charge did not instruct the jury on involuntary manslaughter or that malice is not an element of involuntary manslaughter. In the absence of a charge affirmatively charging that malice is not an element of an offense, there was simply no basis for the jury to

conclude that an uncharged element (here, malice) would affirmatively become part of the offense. In other words, courts are not required to charge the *absence* of elements. However, in Burdette, where the Court affirmatively charged the absence of malice as part of the involuntary manslaughter charge but *not* the voluntary manslaughter charge, the jury could have concluded that the court's failure to charge the absence of malice in voluntary manslaughter meant it was part of the offense. That is simply not what occurred in this jury charge.

Further, Petitioner's argument that the jury somehow thought it could not find Petitioner acted in self-defense based on an erroneous inferred malice charge has no basis in self-defense law. Specifically, when a defendant alleges self-defense, the State has the burden of disproving the following elements beyond a reasonable doubt:

> (1) The defendant was without fault in bringing on the difficulty;
> (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). The elements of self-defense do not include malice or lack of malice.

Petitioner postulates,

> The absence of such an instruction [that voluntary manslaughter does not include malice] means that the jury could have convicted petitioner of voluntary manslaughter by reasoning that the killing included malice but precluded it from acquitting petitioner by reason of self-defense since a defendant had to be without fault in brining on the difficulty.

(App. Br. 13). This statement, however, ignores the judge's very plain and clear instruction to the

jury that it must find Petitioner *not guilty* if the State did not disprove self-defense beyond a reasonable doubt. (App. 526). To assume the jury may have believed the State disproved self-defense but somehow decided it could not acquit him because it inferred malice would be to assume the jury ignored the judge's plain instruction related to self-defense. This is contrary to what our law presumes. See State v. Reyes, 432 S.C. 394, 409, 853 S.E.2d 334, 342 (2020) ("Jurors are presumed to follow the law as instructed to them."). At its core, Petitioner's argument postulates a scenario where the jury would somehow believe he acted with both malice *and* in self-defense. This is illogical, as the definition of malice simply does not encompass a scenario where one is acting in self-defense. If self-defense is justified, how could it include malice? If the jury actually believed Petitioner acted in self-defense, it would have acquitted him of murder—as the Court instructed it to do.

On balance, the charge as a whole was not confusing. Unlike Burdette, it did not include another charge specifically instructing that a different offense did not include malice. If the jury believed Petitioner acted in self-defense (which it was instructed that the State had the burden of disproving beyond a reasonable doubt), it was instructed to acquit him. (App. 526). The jury was *then* instructed to consider whether the State proved beyond a reasonable doubt that Petitioner killed Victim with malice aforethought. (App. 532-33). Thereafter, the jury was instructed, "*If* you find, ladies and gentlemen, that the State has failed to prove beyond a reasonable doubt that the defendant committed murder, *you may consider* whether the State has proved beyond a reasonable doubt that the defendant committed the lesser-included offense of voluntary manslaughter." (App. 534, emphasis added). Here, where the jury was instructed to consider voluntary manslaughter charge *if* it found the State failed to prove murder, it is reasonable to conclude that the jury *first* considered whether the State proved the elements of murder (including malice) beyond a

reasonable doubt. Under this scenario, the jury would have concluded the State did *not* prove murder (including malice) before considering voluntary manslaughter. More critically, the jury was *first* instructed that if the State did not disprove self-defense, it had to find Petitioner not guilty. (App. 526). The instructions were clear and unambiguous.

The jury was additionally properly charged on the presumption of innocence (App. 517-18), the State's burden of proving its case beyond a reasonable doubt (App. 518-19, 523), and that the State had the burden of disproving self-defense beyond a reasonable doubt (App. 526). Adding a charge that voluntary manslaughter does *not* include malice aforethought simply would not have changed the jury's rationale. Thus, the PCR court properly found Petitioner did not show prejudice.

b. Petitioner's argument that the judge erred by not charging the jury that voluntary manslaughter does not include malice is not preserved.

At its core, Petitioner's argument is effectively that the trial court gave an erroneous voluntary manslaughter charge. To support his argument that he was prejudiced by an erroneous charge for murder—which he was NOT convicted of—Petitioner argues the voluntary manslaughter charge did not state malice is not an element of voluntary manslaughter. Petitioner—for the first time on appeal—takes issue with the voluntary manslaughter charge provided by the trial court. Because Petitioner raises this issue for the first time in his Petition, it is not preserved. See Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992) ("[W]e are not abandoning the general rule that ***issues must be raised to***, and ruled on by, the post-conviction judge to be preserved for appellate review." (emphasis added)).

Petitioner now contends this argument was somehow raised to the PCR court because it was in his direct appeal brief. (App. Br. 11). Although the appellate briefs were before the PCR court—as they are in *every* PCR action where a direct appeal has been filed—the existence of this argument in the brief is not sufficient to clearly raise the argument to the PCR court. The PCR Act

requires allegations to be raised with specificity. See S.C. Code Ann. § 17-27-50 (providing a PCR applicant shall "specifically set forth the grounds upon which the application is based"). Following his PCR application—which merely referenced his brief on this issue (which only raised an issue regarding the implied malice charge)—the State sought clarification in its Return on the specific charge Petitioner alleged counsel should have objected to. (App. 572, 584-85). Thereafter, Petitioner filed an amended application raising the issue with the jury charge as follows: "Counsel was constitutionally ineffective for failure to object to the Court charging the jury that malice can be inferred from the use of a deadly weapon." (App. 592). *Nothing* about this allegation—or any of Petitioner's arguments to the PCR court—clarified that Petitioner was raising an issue with counsel's failure to object when the court did not charge that voluntary manslaughter does not include malice. Likewise, when the PCR court's order did not address this issue, Petitioner did not file a motion to reconsider requesting a ruling on whether counsel was ineffective for not objecting to the court's voluntary manslaughter charge. The specific allegation that was actually raised to the PCR court related *only* to the implied malice charge—*not* the voluntary manslaughter charge. Thus, Petitioner's argument related to the voluntary manslaughter charge is not preserved.

c. *The voluntary manslaughter charge was proper, and Petitioner has not pointed to caselaw that existed at the time of trial that requires a court to charge that voluntary manslaughter does not include malice and thus has not met his burden of proving counsel was ineffective in this regard.*

In charging voluntary manslaughter, the trial court charged:

> If you find, ladies and gentlemen, that the State has failed to prove beyond a reasonable doubt that the defendant committed murder, you may consider whether the State has proved beyond a reasonable doubt that the defendant committed the lesser-included offense of voluntary manslaughter. Included within the offense of murder is the lesser offense of voluntary manslaughter. To prove voluntary manslaughter, the State must prove beyond a reasonable doubt that the defendant took the life of another in the sudden heat of passion on sufficient legal provocation. Both heat of passion and sufficient

> legal provocation must be present at the time of the killing to constitute voluntary manslaughter. Sudden heat of passion may, for a time, affect a person's self-control, and temporarily disturb a person's reason. The sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions and would produce an uncontrollable impulse to do violence.
>
> Sufficient legal provocation must be the type that would make a person of ordinary reason, ordinary caution, to become enraged and to lose control temporarily. This provocation needed for voluntary manslaughter must come from some act of, or be related to, the victim. Words alone, however vulgar, however insulting, are not enough to be legal provocation. The exercise of a legal right, no matter how offensive it is to another, is never sufficient legal provocation for voluntary manslaughter.
>
> I'll also charge you that if the heat of passion had cooled, or if there was enough time between the provocation, if any, and the killing, for the passion of a reasonable person to cool, the killing would not be voluntary manslaughter.
>
> In deciding whether a reasonable person would've had enough time to cool off, you should consider all of the circumstances surrounding the killing. You may consider the nature of the provocation, if any; the defendant's mental and physical state; and the circumstances and relationships between the parties, based on evidence introduced during the trial of the case.

(App. 534-36). This charge was proper under the law. See, e.g., State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation."). Petitioner has not pointed to cases that were available at the time of trial that requires a court to charge that voluntary manslaughter does not include malice aforethought and thus has not met is burden of proving deficiency related to the voluntary manslaughter charge.[3] See Strickland, 466 U.S. at 689 ("A fair

[3] Although Burdette subsequently criticized the trial court's failure to include language that voluntary manslaughter does not include malice, it came out after Petitioner's trial, and Petitioner thus cannot rely on it in arguing counsel was deficient. See Harden, 360 S.C. at 408, 602 S.E.2d at 49 ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."); Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d

assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." (emphasis added)); Harden, 360 S.C. at 408, 602 S.E.2d at 49 ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."); c.f. Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) ("Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective *at the time of the alleged error*." (emphasis added)); Strickland, 466 U.S. 668, 689 ("Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.").

596, 600 (2019) (noting "a retrospective PCR analysis under Strickland . . . seeks to determine whether counsel was ineffective *at the time of the alleged error*." (emphasis added)); Further, as set forth above, Burdette is distinguishable from this case because it included an involuntary manslaughter charge that specifically instructed malice is not an element of involuntary manslaughter.

CONCLUSION

Based on the foregoing, this Court should affirm.

Respectfully Submitted,

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This 20th day of April, 2026.

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DANIEL FLUDD,

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RESPONDENT.

CERTIFICATE OF SERVICE

I, Vickie Hall, certify that I have served one copy of Brief of Respondent on Molly M. Keegan, Esquire, counsel of record for the Appellant, by electronic mail to the primary e-mail address as listed in the Attorney Information System (AIS):

Molly M. Keegan Esquire
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I further certify that all parties required by Rule to be served have been served.

This 20th day of April, 2026.

Vickie Hall

Vickie Hall, Legal Assistant

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