THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2013-GS-26-05243
Appellate Case No. 2016-001385

State of South Carolina .... Respondent,

v.

Heather Elizabeth Sims .... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether Heather Sims' voluntary manslaughter conviction must be reversed when the record does not contain any evidence supporting that charge and when the circumstances indicate an impermissible compromise verdict.

STATEMENT OF THE CASE

a. Abbreviated procedural background.

On August 11, 2013, Heather Sims shot her husband David in their home, killing him with a single shot. The State alleged the killing was murder. Heather claimed self-defense.

Formal adversarial proceedings began when Heather's arrest warrant was issued August 23rd. The ten-day trial occurred in November 2015, over two years later.

The trial judge charged voluntary manslaughter in addition to murder. (R.pp.1640-42). This was over Heather's repeated objection. (R.p.1483; pp.1536-37; p.1625). The judge also charged involuntary manslaughter. (R.pp.1642-43). That charge was initially over everyone's objection, (R.pp.1535-36), but the State reversed positions after its closing argument, saying it believed the facts justified both charges. (R.p.1625, lines 12-16).

The jury returned a "not guilty" verdict for murder, "guilty" for voluntary manslaughter, and "not guilty" for involuntary manslaughter. (R.pp.1673-74).

Heather was sentenced to 25 years of prison, suspended to 10 years of prison and 5 years of probation. (R.p.1699). She was convicted and sentenced on November 20, 2015.

Five days later, Heather moved for a new trial or to modify her sentence. (R.pp.7-8). She supplemented her motion with two (2) memos. (R.pp.9-14).

The trial judge heard Heather's motion in December of 2015. He denied the motion in a three page order issued six months later, in June 2016. (R.pp.4-6).

b. Nature of the defense—Heather's case.

The parties hotly contested the facts surrounding this killing and presented starkly different cases to the jury.

Heather claimed she shot her husband during a physical confrontation he initiated. This young couple—both Heather and David were in there 30s—had been experiencing marital difficulties. Their only child was born about four months before this incident. (R.p.1340). Heather said the challenges of parenting and work seemed to build a lot of resentment and hatred. (R.pp.1340-42). She said her husband called her a "bitch" and would say he should have pushed her out the window when she was pregnant. (R.p.1343). When Heather suggested he was too rough with their dog, David responded by asking whether Heather was recommending he punch *her* in the face instead of disciplining the dog. (R.pp.1347-49; 1817). They had been to counseling, individually and together. (R.pp.1351-52). This was David's third marriage and Heather's first. (R.p.1330, line 21-p.1332, line 1).

Describing the incident, Heather said David had been looking to fight all day and that she was in the bathroom preparing a bath for herself and the baby when David came into the bathroom to fix a toilet chain. (R.p.1369, line 24 - p.1371, line 12). Heather said he appeared angry. A verbal argument began, and when Heather retrieved her phone to show David a scheduling conflict between a doctor's appointment and a counseling appointment, David grabbed her and they struggled for control of her phone. (R.pp.1371-73).

After David got control of Heather's phone, he turned his back to her before turning to face her. (R.p.1373, lines 18-23). Heather said he had a knife in his hand. *Id.* David began calling Heather names, taunting her, and told her he would "like to knock the

[expletive] teeth out of her head." (R.p.1373, line 23 - p.1374, line 6). Heather, backing away from him, said she grabbed a pistol out of the bathroom drawer. (R.p.1374, lines 6-15). She explained she had never seen her husband this mad and she was scared. *Id.*

Heather said the gun's presence only made David madder. (R.p.1374, lines 17-22). David continued taunting her as she backed away. (R.p.1374, lines 22-24). David threatened her again, then lunged at her, and when he lunged, Heather said "my hand went up and I shot, and I shot out of a reaction." (R.p.1374, line 24 - p.1375, line 5). She explained "I didn't think, nor did I ever want to do that, but it was a reaction because I was scared." *Id.*

Heather called 911 at 6:13 p.m. from her home phone. (R.p.94, lines 14-19). She tried to call her parents, who are also her neighbors, two minutes later from her mobile phone, but she did not dial the number correctly. (R.p.907, line 1 - p.908, line 1). Heather successfully called her mother at 6:20 p.m. *Id.* Emergency responders were there shortly after 6:30 p.m. (R.p.134). EMS took Heather to the hospital at 6:48 p.m. (R.p.1064). She had knife wounds on her right arm and abdomen. (R.pp.1755 & 1757).

c. Nature of the prosecution—the State's case.

The State claimed Heather's story was fabricated; completely made up.

The supposed motive was financial gain. Heather was a nurse anesthetist—a very high-wage earner—but the State said she was afraid David would divorce her leaving her a single mother who might have to pay alimony because she earned so much. (R.pp.56-57). In July, David secured a $750,000 life insurance policy. (R.pp.986-87). Heather is the beneficiary. *Id.* The State theorized Heather was after the money. Counseling and other activities devoted to saving the marriage were all a ruse. (R.pp.1428-29; pp.1617-18).

The State did not have a consistent theory of the case beyond insisting the killing was murder. Before the pre-trial hearing on whether Heather was entitled to immunity under the Protection of Persons and Property Act, the State offered an expert's opinion that Heather shot David while she was standing upright and David was kneeling. (R.p.1809). The expert later claimed this was a misreading of the affidavit. (R.pp.687-692). At trial, the theory appeared to be money was the motive, but the plan to kill David had been rushed after David supposedly told Heather that night he was leaving her. (R.p.1610, lines 10-22). Heather then allegedly trapped an unarmed David in the bathroom and shot him. *Id.*

The State's case relied heavily on what it believed were inconsistencies in Heather's testimonial evidence and in the physical evidence. The State said Heather manipulated the scene, wiping up blood and giving herself superficial knife wounds that would appear to be defensive wounds. (R.pp.1595-96). A knife was resting in David's hand when law enforcement arrived at the scene. (R.p.1813). The State said the knife was obviously planted in David's hand after Heather cut herself to cover up a premeditated murder. (R.p.1605).

The State said Heather could not get her story straight, initially saying her husband came at her with a wrench and later saying he had a knife. (R.pp.1594-96). The State attacked Heather's demeanor during the 911 call and the two hours of police questioning to which Heather voluntarily submitted while being treated in the hospital, claiming Heather was "cool as a cucumber." *Id.* The State said Heather took her husband's phone and "wiped it." (R.p.1611). This alleged dishonesty was all supposedly to hide murder. (R.p.1606).

There were serious issues with the State's case. For starters, there was no evidence David was leaving Heather. This was completely made up. It has no support in the record.

Second, the "crime scene manipulation" argument was implausible given the time frame. Law enforcement arrived 20 minutes after Heather called 911 and 10 minutes after she called her parents. (R.p.134). That is a remarkably brief window to come up with a plan, execute self-administered wounds, and doctor the crime scene. Heather had to do this well—a DNA expert from SLED examined the knife in David's hand. Heather's blood was on the blade, David's blood and "touch" DNA were on the handle, and there was no "touch" DNA suggesting Heather handled the knife. (R.pp.1078-1094).

There was disagreement over Heather's wounds. The State's expert opined the cuts on Heather's right arm, see (R.p.1755), were self-inflicted, as was the stab wound on her abdomen, (R.p.1757), which he said was only 3 millimeters deep based on his reading of hospital records. (R.pp.652-654; pp.679-680). Heather's expert said the abdominal wound was indisputably *over an inch deep*—33 millimeters—and almost caused serious damage. (R.pp.788-792). He had an MRI to prove it, (R.p.1811), and explained hospital records do not note precise depth, but focus on whether the peritoneal cavity is penetrated. (R.pp.790-92). Another expert explained it was unlikely Heather's arm wounds were self-administered. Heather is right handed; the cuts were on her right arm. (R.pp.1202-1204). An exhibit showed defensive cuts similar to Heather's. (R.p.1807).

Finally, Heather explained she did not "wipe" her husband's phone, which was, in fact, on Heather's account and owned by her. (R.p.777). Heather explained she took the phone out of David's pocket in the seconds following the shooting, attempted to use it, and discarded it when she could not use it. (R.p.1384). She said she had the phone "reset" a few days later so the phone would be usable. (R.pp.1400-1405). The police took custody of

Heather's phone the night of the incident but released the house and all its contents within hours and had not asked for David's phone or anything else. *Id.*; also (R.pp.360-61).

The list of contested matters could go on and on. The point is not to list them all. *Everything* was bitterly contested. Heather adamantly maintained her innocence. The State thought every bit of Heather's story was a laughably false attempt to cover up murder.

ARGUMENT

First, there is no evidence of voluntary manslaughter in this record. The reason why is simple: nobody tried that case. The State claimed murder and Heather insisted she acted in self defense. Evidence of voluntary manslaughter—a *criminal* killing done in rage, anger, resentment, or terror—would have critically weakened each side's credibility. That did not happen here. Each side stuck to its theory and did not waiver.

Second, nobody bothered to articulate a theory at trial that would amount to voluntary manslaughter. The trial court's explanations for giving the charge did not make sense. The State's argument was incorrect as a matter of law. This is not dispositive, but the lack of a lucid explanation for the charge tends to show the charge was not the result of deliberate analysis based on a close view of the evidence. It looks like charging voluntary manslaughter was a knee-jerk reaction. A jury charge is not the place for knee-jerk reactions.

Finally, the circumstances suggest a compromise verdict between self-defense and murder. Precedent explains these verdicts are the predictable results of giving lesser charges not supported by the evidence. That is precisely what occurred here. This was murder or nothing. The jury's acquittal of murder and the absence of evidence supporting voluntary manslaughter require outright reversal, with no retrial.

A. The State insisted on murder and the defense consistently claimed self-defense. Nobody offered evidence of voluntary manslaughter. Such evidence would have weakened each side's credibility.

Jury charges must be tied to whether any evidence supports the charge in question. Heather was indicted for murder, not voluntary manslaughter. (R.pp.1-2). Although voluntary manslaughter is a lesser-included offense of murder, *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014), this Court has explained "a request to charge a lesser included offense is proper only when the evidence could support a reasonable inference that the defendant committed the lesser rather than the greater offense." *State v. Morris*, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991). The State cannot argue for a lesser charge by speculating the jury can accept some parts of the State's case but reject other parts. *Id.* at 483, 415 S.E.2d at 821. Unless the evidence gives rise to a reasonable inference supporting the lesser charge, a charge on the lesser offense is improper.

Voluntary manslaughter is the intentional and unlawful killing of another person while the defendant is acting in a sudden heat of passion and upon sufficient legal provocation. *State v. Niles*, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015). It requires criminal intent to harm someone else. *Id.* at 523, 772 S.E.2d at 881 (citing *State v. Childers*, 373 S.C. 367, 375–76, 645 S.E.2d 233, 237 (2007)). It requires the deceased to have provoked the defendant. The provocation must be, as this Court explained in *State v. Locklair*, so severe that it "naturally and instantly" causes the defendant to experience the highest degree of rage, anger, sudden resentment, or terror. 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000). Paradigm examples include a killing done immediately after discovering

a spouse's adultery, a killing done when a defendant has an *unreasonable* fear of harm from the deceased, or a killing done when the defendant was at fault in causing the fatal encounter. *Sams*, 410 S.C. at 315, 764 S.E.2d at 517 (describing "imperfect self-defense"); *State v. Cooley*, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668 (2000) (describing adultery). Voluntary manslaughter happens in a prompted frenzy—blind rage, terror, or exasperation—overtaking the mind, shutting out reason, and producing an irresistible urge to kill.

There is no evidence of voluntary manslaughter in this record. Heather's story—that David cut her, perhaps intentionally, perhaps inadvertently, and then threatened to physically harm her while brandishing a weapon—supports nothing but self-defense. Heather said:

> I kept backing up, and as I was backing up around the vanity to get back into the bedroom, he said again, I would like to knock your f'ing teeth out of your head, and he lunged at me, and when he did, my hand went up and I shot, and I shot out of a reaction. I didn't think, nor did I ever want to do that, but it was a reaction because I was scared.

(R.p.1374, line 24 - p.1375, line 5). This testimony does not support provocation for manslaughter or "heat of passion." Other defendants who claim they struck the fatal blow during a quick reaction and based on fear have been denied a voluntary manslaughter charge, and properly so. *Niles*, 412 S.C. at 523, 772 S.E.2d at 881; *State v. Starnes*, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010). Heather's case is similar in this respect: According to Heather's story, she had no criminal intent whatsoever. She shot during a physical assault perpetrated by her husband as their four-month old child lay in the other room. The lack of provocation, heat of passion, and criminal intent make manslaughter improper. Period.

The State's central argument at trial was that Heather was lying, but to justify a voluntary manslaughter charge, there still must be evidence David provoked Heather in a

way that is legally sufficient and that Heather intentionally killed David in criminal rage or terror. The Court will judge for itself, but the evidence is not there.

Consider the State's principal impeachment witness, Allyson Brown. This person was a friend of Heather's. The State called her because the State believed Heather gave Allyson a different description of the incident shortly after it happened, two years before trial.

This witness supported Heather's testimony in all material respects. According to Allyson, Heather said David came at her to get her phone, grabbing her and pinning her arms against her chest. (R.p.942). David supposedly bit Heather's finger to get Heather to let go of her phone and the phone supposedly slid across the floor. *Id.* Heather noticed she had been cut when David went to get her phone from the floor. *Id.* Heather grabbed the gun, held it by her side, and David began taunting her. *Id.* Then, David came towards Heather, threatened her, lunged at her, and she shot him once. (R.pp.942-43). Heather's story, as her counsel explained during this witness's examination and again in closing argument, has always been consistent: David entered the bathroom to work on the toilet, they argued, he turned on her with a knife, lunged at her, and she shot. (R.pp.969-71; p.1569). Evidence of provocation, heat of passion, and criminal intent is still conspicuously lacking.

Consider the State's argument about Heather's wounds. In addition to the cuts the State believed were self-inflicted, Heather had significant bruises, (R.p.1815), which the State also claimed were self-inflicted. The State insisted self-inflicted wounds were evidence of a meticulous cover up and, consequently, evidence of malice. (R.pp.49, 1001, 1008, & 1612). The argument is consistent with precedent: Deliberate actions and planning are not compatible with voluntary manslaughter. See *Niles*, 412 S.C. at 523, 772 S.E.2d at 881;

State v. Smith, 363 S.C. 111, 116, 609 S.E.2d 528, 530-531 (Ct. App. 2005); and *State v. Pittman*, 373 S.C. 527, 572-576, 647 S.E.2d 144, 167-170 (2007). The mental frenzy required for voluntary manslaughter is inconsistent with executing a detailed scheme.

Arguing a voluntary manslaughter case would have required the State to directly undermine its murder case, conceding its theories of premeditation and malice were false.

Finally, consider the Supreme Court's decision in *Cook v. State*, issued less than a month after the jury's verdict and reversing a voluntary manslaughter conviction on the same grounds argued here—insufficient evidence. There, as here, the record lacked evidence of heat of passion: The *Cook* defendant's claim was bolstered by several things including the testimony of an eyewitness who saw the defendant and the deceased talking softly before the fatal shot was fired. The Court reasoned soft talking is incompatible with the defendant being enraged to the point of killing. 415 S.C. 551, 557, 784 S.E.2d 665, 668 (2015).

There are no witnesses in Heather's case, but the same reasoning applies. Heather shot one time. There is no evidence of rage. The State said she shot with malice, faking a fight later. Heather said she shot in self-defense. Here, as in *Cook*, see *id.* at 555 n.2, 784 S.E.2d at 667 n.2, the prosecutor argued the case was murder or self defense. (R.p.39).

The trial judge commented during the post-trial hearing how it would have been helpful to have *Cook* before the verdict in Heather's case. (R.pp.1713-14; p.1719). Oddly, the order denying Heather's post-trial motion does not discuss this precedent or any other; instead summarily remarking "the evidence justifies the verdict." (R.pp.4-5).

There is no evidence Heather lost control of her actions. She shot in fear, but that is not enough. There must be provocation, heat of passion, and criminal intent. None are here.

B. Nobody bothered to articulate a theory at trial that would amount to voluntary manslaughter. The trial court's explanations for giving the charge did not make sense. The State's argument was incorrect as a matter of law.

The record does not contain a lucid explanation for why the trial judge charged voluntary manslaughter.

The first discussion of jury charges occurred shortly after the defense rested its case. Heather's counsel renewed the motion for a directed verdict, explaining Heather was indicted for murder, not voluntary or involuntary manslaughter, and explained there was no evidence of either offense in the record. (R.pp.1472, 1483). The trial judge offered no explanation for its intent to charge voluntary manslaughter. The State was similarly silent.

Then, immediately before closing arguments began, the judge announced he would hear arguments about charging manslaughter. (R.p.1534). The State did not say anything about voluntary manslaughter; arguing only that there was no evidence supporting involuntary manslaughter. (R.p.1535). Heather's counsel argued the case was murder or nothing. (R.p.1536). The judge then announced it was charging both lesser offences. *Id.* The judge explained it was doing so even though *both sides* disagreed with him. *Id.*

The judge offered reasons for this, but they do not make sense. At trial, the judge said Heather testified that she raised the gun and it just "went off." *Id.* That was not Heather's testimony. At the post-trial hearing, the judge focused on Heather's testimony she warned her husband to stop because she was scared. (R.p.1717, lines 14-20).

The post-trial reasoning fairly describes Heather's testimony that she shot because she was scared, but it ignores everything else in Heather's statement, which uniformly

supports self-defense. A charge on a lesser offense requires more than speculation that the jury can accept some parts of a party's case but reject other parts. *Morris*, 307 S.C. at 483, 415 S.E.2d at 821. The jury would have to find Heather shot in fear, but then find some legal provocation *other than* the assault Heather described. The assault supports self-defense.

The only justification the State offered for voluntary manslaughter is incorrect as a matter of law. At the post-trial hearing, the State argued a reasonable inference from the evidence was that David stabbed Heather, she grabbed a gun, David then threatened to harm Heather again, and Heather shot. (R.p.1733, lines 4-21). The State claimed, shockingly, that such facts support a voluntary manslaughter charge. *Id.* This narrative supports nothing but self-defense. It was also the polar opposite of every argument the State offered at trial, during which the State said:

> You are here for a murder case. (R.p.38, lines 15-16).
>
> The question in this case is, is this a justified killing, or is this a murder? (R.p.39, lines 17-19).
>
> It is not who did it, it is just merely whether or not this is a murder or this woman was acting in some form or fashion of self-defense. (*Id.*, lines19-22)
>
> You find this is nothing short of murder, a malicious intentional murder and a woman who worked very hard to cover it up. (R.p.58, lines 7-9).
>
> This was never self-defense. If it was self-defense, these people would have never had to alter that scene and wipe anything down. This was always a murder. (R.p.1001, lines 3-5).
>
> The reason we are here is . . . because this woman has murdered that man. Every answer . . . leads to the fact that he was unarmed. (R.p.1008, ll. 3-6).

The State concluded its presentation by telling the jury "when you look at all the evidence, you see this woman is nothing short of guilty of murder." (R.pp.1622-1623).

This point is not dispositive. It is certainly possible to imagine a hypothetical case where the record supports a lesser-included charge even though neither side argued for one. But the lack of a lucid explanation for the charge tends to show the charge was not the result of deliberate analysis based on a close view of the evidence. The circumstances are similar to the circumstances in *State v. Scott*, in which the Supreme Court conspicuously noted the party who requested a charge on a lesser-included offense could not articulate the evidence supporting that charge. 414 S.C. 482, 486, 779 S.E.2d 529, 530-531 (2015).

It makes no sense for a trial court to introduce the idea of giving lesser-included charges when neither party requests them, and if principles of judicial estoppel mean anything, they surely bar the State from switching positions after affirmatively claiming a case is murder or nothing. The Court need not reach estoppel here. The justifications for voluntary manslaughter offered by the trial judge and the State are indisputably inaccurate.

C. The circumstances suggest a compromise verdict between self-defense and murder; an impermissible, yet predictable, result of giving a compromise charge unsupported by the evidence.

It is difficult to reconcile the jury's verdict with the evidence. It seems reasonable to infer that by rejecting murder, the jury rejected the State's arguments that there was no physical altercation and that Heather faked her injuries. This is sensible given the lack of evidence supporting the State's theory. Heather's medical experts gave strong testimony, while the State's expert demonstrated confusion about important medical terminology. Compare (R.p.695) with (R.p.789) and (R.pp.1206-1208). He also mistakenly located Heather's stab wound in her chest, (R.pp.668-669), and asked for David's autopsy report when he was questioned about Heather's medical records. (R.pp.670-673).

Yet, as the trial judge noted during the argument on Heather's post-trial motion, the jury was charged on the law of self-defense, had the opportunity to render a self-defense verdict, and declined to do so. (R.p.1716, lines 22-24). This suggests the jury believed Heather *was* assaulted, but that she should have run away instead of defending herself, or that Heather shot because she was mad as well as scared. Unwilling to find a full-acquittal—or perhaps compromising between some jurors who favored murder and others who believed self-defense—the jury settled on voluntary manslaughter. The court specifically noted during sentencing "several" jurors asked him to be merciful. (R.p.1698, lines 21-22).

Verdicts that are not supported by the evidence are impermissible, and although there is no way to know whether the jury would have been able to decide between self-defense and murder or would have deadlocked, the constitutional prohibition on double jeopardy prevents a defendant like Heather from being retried for murder. The Supreme Court noted this aspect of compromise verdicts in *Cook*, 415 S.C. at 559, 784 S.E.2d at 669, quoting verbatim its previous decision in *State v. Cooley* which explains Heather may not be tried again and that "[t]his is a cautionary tale for solicitors as to the pitfalls of requesting a potential 'compromise' charge which is unsupported by the evidence." *Cooley*, 342 S.C. at 70, 536 S.E.2d at 670. Heather's verdict form does not leave room for doubt. The jury marked "not guilty" for murder as well as involuntary manslaughter. (R.p.3). Indeed, the haphazard inclusion of an involuntary manslaughter charge prevents a retrial on *that* crime, even though no evidence supported the charge in the first place.

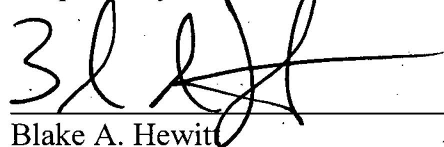
This case was murder or nothing. The jury's acquittal of murder and the absence of evidence supporting voluntary manslaughter require outright reversal, with no retrial.

CONCLUSION

This was, as Heather's trial counsel argued, a weak murder case based not on actual evidence, but on suspicion, opinions, and speculation. Maybe Heather should have turned and run instead of grabbing a gun and standing her ground. Maybe her husband would have chased her. Maybe he would have let her go. Maybe her husband would have hurt her. There is no way to know. The law does not hold people to a standard of perfection. Heather did not have to retreat in her own home, even if she could have. *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).

Maybe Heather should have refused to cooperate with the police. Then, she might not have to suffer the insult of having her actions subjected to withering scrutiny and having every imperfection in her memory thrown back in her face while she is repeatedly called a liar. David Sims' death is unquestionably a tragedy, but it is also, without question, not voluntary manslaughter. This Court should reverse.

Respectfully submitted,



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APPEAL FROM HORRY COUNTY
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State of South Carolina . . . . Respondent,

v.

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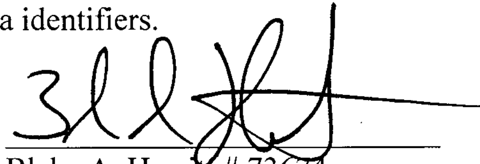
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.



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