STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals

Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2019-001770

DEMETRIUS SIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Issue Presented

The Court of Appeals erred in holding that the trial judge did not err in allowing the jury to hear prejudicial prior bad acts evidence in the form of a statement where the homeowner stated on a 911 call that "the same guy came back" because petitioner was being tried on two burglary charges that occurred at the same residence and on the same date within a few hours apart as this suggested petitioner's guilty on both burglary charges.

Respondent's Issue Presented

Did the Court of Appeals properly hold that the trial court did not err in allowing the jury to hear a comment made by the victim in a recording of his 911 call in which he said "the same guy's back" when Petitioner did not object on the ground that the comment constituted evidence of prior bad acts and when the comment was not improper due to its not being evidence of a prior bad act or else was evidence of Petitioner's comment plan or scheme or was part of the res gestae of the Petitioner's crimes?

A. The issue of whether the relevant portions of the 911 call constituted improper evidence of prior bad acts was not preserved for appellate review.

B. The trial court properly allowed the jury to hear the portion of the recording containing the phrase the "same guy's back" because the statement was not inadmissible as evidence of a prior bad act.

STATEMENT OF THE CASE

During its October of 2013 term, the Greenville County Grand Jury indicted Demetrius Simmons (Petitioner) for resisting arrest with assault, three counts of breaking and entering a motor vehicle, grand larceny, and two counts of first-degree burglary. Joseph Brantley Maxwell, Esquire, and Sarah Morrison Henry, Esquire, represented Petitioner, and Assistant Solicitor Jennifer A. R. Tessitore of the Thirteenth Circuit Solicitor's Office prosecuted the case. On December 11, 2013, through December 12, 2013, the State called Petitioner's case to trial before the Honorable C. Victor Pyle, Jr., (trial court) and a jury. Petitioner was not present for his trial despite clear notice of the trial date and the trial proceeded in his absence. During trial, the State amended the indictment for resisting arrest with assault to the lesser-included offense of resisting arrest without objection from Petitioner. App. 4-5, 149-50. At the conclusion of trial, the jury convicted Petitioner of two counts of first-degree burglary, resisting arrest, the lesser-included offense of petit larceny, and breaking and entering a motor vehicle. The trial court sealed his sentence and issued a bench warrant for Petitioner's arrest. On October 16, 2014, Petitioner appeared before the trial court, which unsealed and sentenced Petitioner as follows: imprisonment for fifteen years for each of the burglary offenses, five years for breaking and entering a motor vehicle, one year for resisting arrest, and thirty days for petit larceny. Petitioner did not appeal his convictions or sentences.

Petitioner filed a timely application for post-conviction relief on September 17, 2015, alleging trial counsel was constitutionally ineffective for failing to move to suppress evidence, failing to appeal the trial court's subject matter jurisdiction, and failure to investigate, and alleging that his due process rights had been violated due to his being tried in his absence. App.

204-14. Respondent made its return on July 7, 2016, requesting the summary dismissal of Petitioner's challenge of the trial court's jurisdiction and allegation of a due process violation, and requesting an evidentiary hearing regarding Petitioner's allegation of the ineffective assistance of counsel. App. 215-21. An evidentiary hearing was convened before the Honorable John C. Hayes, III, (PCR court) on December 9, 2016, at the Greenville County Courthouse. R. Mills Ariail, Jr., Esquire, (PCR counsel) was present on behalf of Petitioner, and Assistant Attorney General Patrick Schmeckpeper represented Respondent. One of the grounds upon which Petitioner proceeded at the PCR hearing was that he did not knowingly and voluntarily waive his right to a direct appeal. The PCR court denied Petitioner's application for post-conviction relief and dismissed the action with prejudice in an Order of Dismissal issued on December 20, 2016, including the allegation that he was denied his right to a direct appeal. App. 255-61. The PCR court found that trial counsel credibly offered evidence that Petitioner did not ask for an appeal. App. 259.

PCR counsel filed a timely notice of appeal on Petitioner's behalf. Deputy Chief Appellate Defender Wanda H. Carter of the South Carolina Commission on Indigent Defense – Office of Appellate Defense filed a petition for writ of certiorari and motion to be relieved as counsel pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). This Court denied the motion and directed the parties to address the issue of whether the PCR court erred in denying Petitioner's allegation that he did not knowingly and voluntarily waive his right to a direct appeal, and directed the parties simultaneously to brief Petitioner's direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). App. 282. Petitioner argued in his petition for writ of certiorari that the PCR court erred in denying Petitioner's allegation that

he did not knowingly and voluntarily waive his right to a direct appeal. App. 284-90. Respondent conceded the issue in its return to petition for writ of certiorari, and agreed that Petitioner was entitled to a belated appellate review of direct appeal issues pursuant to White. App. 301-08. This Court issued an unpublished opinion granting the petition for a writ of certiorari and reversing the PCR court's finding that Petitioner knowingly and voluntarily waived his right to a direct appeal and transferring the direct appeal issues to the Court of Appeals for review. Simmons v. State, Op. No. 2019-MO-012 (S.C. Sup. Ct. filed February 27, 2019).

Petitioner argued in his petition before the Court of Appeals that the trial court erred in admitting a recording of the victim's call to 911 because a statement on the call that the "same guy's back" and another that break-ins had been occurring in the area constituted evidence of prior bad acts that likely cause the jury to convict Petitioner of the first burglary as well as other burglaries that had been committed in the victim's neighborhood. The Court of Appeals affirmed in an unpublished opinion. Simmons v. State, Op. No. 2019-UP-256 (S.C. Ct. App. filed July 17, 2019) (per curiam), reh'g denied, State v. Simmons, S.C. Ct. App. Order dated September 19, 2019.

STATEMENT OF FACTS

Petitioner was tried in his absence for two counts of burglary and related offenses stemming from two break-ins that occurred at the victim's residence a few hours apart. App. 4. Three witnesses testified at trial on behalf of the state: the victim, the victim's wife, and the arresting officer. App. 38-143. The victim's wife testified that on the morning of January 31, 2013, she entered her car parked in the garage of the victims' home and noticed that it had been plundered and her garage door remote was missing. App. 38-42, 51-53. She also noticed the right-side garage door, which had not been operating properly, was partially opened. App. 53. The victim's green mountain bicycle was missing from the interior of the garage. App. 40. The victim's wife called the police and reported the incident while driving to work. App. 57-61. The victim testified he stayed home on that morning after his wife left for work. App. 81. Police arrived after his wife called 911. App. 81. He testified he gave the police a report containing what was missing from the garage, which included his green mountain bicycle. App. 81. Not long after the departure of police, he heard the garage door open and observed a man wearing a green, hooded sweat top pulling a box out of the garage. App. 83-87, 100. The victim made his own call to 911 and, within minutes, the perpetrator was apprehended after leading police on a short chase. App. 93, 103, 116-23. The perpetrator was riding the victim's missing bicycle at the time of his arrest, and was later identified as Petitioner. App. 73-74, 104.

The police received two 911 calls: one call from the victim's wife and a second call from the victim. The victim's wife called 911 while commuting to work on the morning of January 31, 2013, and the victim called 911 just hours later on the same morning when the second break-in occurred. App. 93. Prior to trial, both parties agreed to redact the portion of the recording of the

victim's 911 call wherein the dispatcher said "the same guy's back" and the portion wherein the statement was made that there had been a streak of break-ins in the area. App. 27-28, 95-98. When the State moved to admit the recording into evidence and publish to the jury, Petitioner did not raise any objection. App. 93-94. The State redacted the portions of the recording containing the reference to other break-ins in the area or the operator's statement that "the same guy's back", but it did play the portion containing the victim's statement that "the same guy's back", to which Petitioner objected. App. 95-97.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). Likewise, decisions regarding the conduct of a criminal trial are left largely to the sound discretion of the trial judge, and a trial judge's ruling on the conduct of a trial will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

The Court of Appeals properly held that the trial court did not err in admitting the victim's comment on the 911 recording that "the same guy's back" because the issue was not preserved for appellate review when Petitioner did not object on the basis of prior bad acts at trial, and the comment did not constitute evidence of a prior bad act since it was or constituted an exception to Rule 404(b), SCRE.

Petitioner argues the trial court erred in admitting a portion of the recording of the victim's 911 call into evidence because the statements therein that "the same guy's back" and that there had been a streak of break-ins in the area constituted evidence of prior bad acts that likely caused the jury to convict Petitioner believing him to be guilty of the first burglary of the victim's home and the other neighborhood break-ins based on the comments. First, the issue is unpreserved for appellate review because Petitioner's arguments on appeal are different than the objection he offered at trial. Second, the victim's comment that "the same guy's back" was not evidence of a prior bad act but represented proper evidence of Petitioner's guilty of both burglaries when his actions and possession of stolen items connected him to both burglaries, or fit within an exception to Rule 404(b), SCRE.

A. The issue of whether the relevant portions of the 911 call constituted improper evidence of prior bad acts was not preserved for appellate review.

Before the jury had been sworn and before the parties had made their opening statements, Petitioner stated his concern that the 911 call contained a statement from the operator that "the same guy's back" when she had not been at the victim's home to observe the true identity of the burglary. App. 27-28. The State informed the Court that it had already redacted a portion of the recording wherein someone stated that there had been a streak of break-ins. App. 28. The parties agreed to redact the operator's comment that "the same guy's back" when publishing the recording. App. 28. When the State moved to admit the recording into evidence and publish,

Petitioner did not raise any objection. App. 93-94. The State redacted the portions of the recording containing the reference to other break-ins in the area or the operator's statement that "the same guy's back", but published the portion containing the victim's statement that "the same guy's back", to which Petitioner objected. App. 95-97. The State argued the victim's statement would be admissible because it constituted an excited utterance or present sense impression of the victim. App. 96-97. When making his objection, Petitioner argued:

> I'm not necessarily objecting to the hearsay aspect of it. I'm not waiving that either at this point. But my contention is that at the beginning, [the State] did approach me about trying to exclude certain things and we even talked about it in front of Your Honor about excluding this one statement from the 911 operator about he's coming back. You know, so maybe I would just – under false impression or something like that, but that's my basis for the objection is that I was under the impression that all these type statements would be excluded or redacted.
>
> Now, as far as hearsay goes, I don't know if it's an excited utterance or not. It is a conclusion. It's not an observation of what he's observing. But Your Honor, I would just ask . . . ."

App. 97.

Petitioner's objection was based upon his impression the victim's comment that "the same guy's back" would be redacted just as the parties had agreed to do with the same comment from the operator and upon the ground that the victim's statement constituted a conclusion and not an observation. App. 97. The trial court allowed the victim's comment on the recording that "the same guy's back" to be played for the jury, subject to Petitioner's objection, and informed Petitioner he could cross-examine the victim about the comment. App. 97-98. Petitioner **never** objected to the victim's comment on the recording on the basis that the statement constituted evidence of a prior bad act. App. 95-97.

The moving party must contemporaneously object when the evidence is offered for

admission before the jury. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). The party seeking to prevent the evidence's admission must challenge the admission upon the same legal basis in order to preserve the objection for appellate review. It must be clear that the party is presenting the argument upon the same ground. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). The objection should have enough specificity to bring into focus the nature of the alleged error so that it permits the trial court to reasonably understand the objection and alleged error. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). An issue will not be preserved for appellate review if the substance of the objection at trial does not comport with the specific issue raised on appeal. State v. Dickman, 341 S.C. 293, 295 S.E.2d 268, 269 (2000). "A party may not argue one ground at trial and an alternate ground on appeal." Id. at 142, 587 S.E.2d at 693-94.

Petitioner now argues for the first time that the publishing of the reference to a streak of break-ins in the area allowed the jury to hear evidence of Petitioner's prior bad acts, improperly giving the impression to the jury that Petitioner was guilty of other burglaries in the victim's neighborhood. The State made it clear on the record during the pre-trial discussion that it had redacted the portion of the recording wherein someone made the comment that there had been break-ins in the area and pointed out again after Petitioner's trial objection that the comment about the streak of break-ins had not been played to the jury. App. 28, 96-97. Petitioner apparently conceded the point that this portion of the tape was not an issue, indicating that the jury did not hear the reference to break-ins in the area. There could be no trial court error with respect to this portion of the tape as Petitioner's preferences were accommodated, and Respondent submits that Petitioner's argument position that the jury heard reference on the

recording to break-ins in the area is based upon a factual misreading of the record.

A second novel argument from Petitioner is that the publishing of the victim's comment on the recording that "the same guy's back" constitutes evidence of prior bad acts causing the jury to convict Petitioner of the first burglary on an improper basis. Petitioner did not offer any contemporaneous objection to the comment, as he initially informed the Court that he had "[n]o objection" to the admission of the recording and did not objection to the State's request to publish the recording. App. 93-94. Petitioner's argument the comment constituted evidence of a prior bad act is being raised for the first time on appeal. Because Petitioner did not offer a contemporaneous objection to the admission of the recording, and did not argue the comment constituted evidence of a prior bad act even when he did object to the publishing thereof, Petitioner failed to preserve the issue for appellate review.

B. The trial court properly allowed the jury to hear the portion of the recording containing the phrase the "same guy's back" because the statement was not inadmissible as evidence of a prior bad act.

Petitioner's argument that the recording should have been excluded at trial is that the recording contained evidence of prior bad acts or crimes that gave the jury the improper impression that Petitioner was guilty of the first burglary as well as the other burglaries in the area.[1] Regardless of issue preservation concerns, Petitioner's argument fails because Petitioner was being tried for multiple offenses, and the statement was admissible as proper evidence for the jury since Petitioner was being tried for two burglaries.

[1] As argued in the previous subsection, the undersigned submits Petitioner's argument as to trial court error in admitting the reference on the recording to burglaries in the area is based upon a misreading of the record, which properly indicates the State redacted that portion of the call in accordance with Petitioner's wishes; the comment of a "streak of break-ins" was never published at trial. As such, that comment will not be addressed in this section.

Important to the State's case at trial was that the victim's garage door opener and bicycle had been stolen during the first burglary. The victim and his wife testified as to the garage door opened that had been taken from the couples' parked cars and the bicycle that had been taken from the interior of the garage during the first burglary. The victim testified he was alerted to the burglar's return when he heard the garage door open after the police left following their investigation into the first burglary. The victim testified he confronted the burglar, who then fled the scene while riding the bicycle that had gone missing from the victim's home during the earlier burglary. In closing, the State argued Petitioner had committed both burglaries because he was found, immediately after his flight from the second visit to the victim's home, to have items in his possession that had been taken during the first burglary. App. 162. The State did not specifically refer to the victim's comment on the recording of his 911 call that "the same guy's back", instead relying upon the connection of Petitioner's flight from the second burglary and his possession of items from the first. Petitioner's objection at trial concerned whether the comment was constituted an improper inference on the part of the victim, stating "[i]t is a conclusion. It's not an observation of what he's observing. App. 97. Further, Petitioner had the opportunity at trial to cross-examine the victim on his comment during the 911 call, either to cast doubt upon the victim's apparent inference that the burglar's use of the garage door opened and bicycle during the second burglary indicated Petitioner was the perpetrator of the first burglary or cast doubt upon the State's case that the evidence linked Petitioner to both burglaries.

Although Petitioner now argues the victim's comment was inadmissible as evidence of prior bad acts, Petitioner does not identify any limiting principle. The comment was not so different from the other testimony at trial connecting Petitioner's second burglary and his

possession of property taken from the victim's home during the initial burglary, testimony which Petitioner does not argue is evidence of prior bad acts. In a case such as this, where there was eyewitness that could connect Petitioner to the first burglary absent his possession and use of the bicycle and garage door opener, it would be impossible to try Petitioner at the same time for the first and second burglaries, an absurd result, especially when Petitioner did not move to sever the trial for the purpose of isolating the two burglaries.

Even if the comment constituted evidence of a prior bad act, it was nevertheless admissible as an exception to the rule. "When there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the South Carolina Court of Appeals has held prior bad acts are admissible to demonstrate a common scheme or plan." State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008). "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id. Evidence of prior bad acts must logically relate to the charged offense, and the probative value of the evidence must outweigh any danger of unfair prejudice. State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). "The acid test of admissibility is the logical relevancy of the other crimes." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Evidence of other crimes is admissible under the res gestae theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); see State v. Sweat, 362 S.C. 117,

606 S.E.2d 508 (Ct. App. 2004) (finding temporal proximity of other acts to the charged crime is important in determining admissibility). "When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." State v. McGee, 408 S.E. 278, 288, 758 S.E.2d 730, 735-36 (Ct. App. 2014) (internal quotation omitted) (quoting State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005)).

"Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Clasby, 385 S.C. 148, 150, 682 S.E.2d 892, 896 (2009) (citing Rule 403, SCRE; Gaines, 380 S.C. at 29, 667 S.E.2d at 731; State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)). Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." Id. (citing State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008)). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). Unfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of a piece of

evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

In this case, the recording gave the jury an idea of the events as they unfurled, making the evidence of exceptionally high probative value. This is especially the case when, as here, Petitioner's crimes occurred over a period of time and constituted multiple visits to the victim's home, one of which the victim witnessed in real time. His return to the victim's home hours after his first burglary and his entry into Petitioner's garage in both cases demonstrates the pattern in Petitioner's criminal behavior with respect to the victim's home. Any prejudice to Petitioner stems from the inculpatory nature of the evidence, which had substantial probative value, and not

from an improper basis. Accordingly, the trial court properly admitted the victim's comment on the recording that "the same guy's back" and the Court of Appeals properly affirmed.

CONCLUSION

The Court of Appeals did not err in holding that the trial court properly admitted the victim's comment on the recording of his 911 call because the issue was not preserved for appellate review because Petitioner first argued the comment constituted improper evidence of bad acts on appeal, and the comment was not evidence of a prior bad act or was an exception to Rule 404(b), SCRE. This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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December 10, 2019

STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
Honorable John C. Hayes, Circuit Court Judge

Appellate Case No. 2019-001770

Demetrius Simmons, 283195, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Taylor Z. Smith, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
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I further certify that all parties required by Rule to be served have been served. This 10th day of December, 2019.

TAYLOR Z. SMITH
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