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IN THE INDIANA COURT OF APPEALS
CAUSE NO. 20A-CR-00228

JOHN E. MARTIN,	**)**
Appellant,	**) Appeal from the Tippecanoe Circuit Court**
	)
vs.	**) Trial Ct Cause No. 79C01-1702-F5-000020**
	)
STATE OF INDIANA,	**) Hon. Sean Persin, Judge**
Appellee.	**) Hon. Daniel J. Moore, Magistrate**

APPELLANT'S REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

In this matter, the trial court abused its discretion by admitting into evidence the results of Mr. Martin's blood test performed at St. Elizabeth because the State failed to show that Linenmeyer was acting under a protocol prepared by a physician when she drew Mr. Martin's blood.

To expand, Indiana Code section 9-30-6-6 is clear in its mandate that blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician. The Indiana Supreme Court has explained that the foundation for admission of laboratory blood drawing and testing results involves technical adherence to Indiana Code section 9-30-6-6. Precedent dictates that this is not a requirement that may be ignored.

In this matter, the State does not dispute that it relied solely on the testimony of Linenmeyer to lay the necessary foundation for the admission of Mr. Martin's blood-test results as required under Indiana Code section 9-30-6-6. The State merely contends that Linenmeyer's testimony was sufficient to show that Linenmeyer performed the blood-draw pursuant to protocols prepared by a physician. Yet, a review of Linenmeyer's testimony reveals that Linenmeyer failed to provide any specifics as to what, if any, protocols were in place for legal blood draws at St. Elizabeth when she performed the blood draw on Mr. Martin. Instead, Linenmeyer's testimony only described her general practice she had developed as to her method of drawing blood. Linenmeyer's testimony describing her general practice of drawing blood is insufficient to lay the requisite foundation for admission of results from a legal blood draw.

Furthermore, the State argues that even if the admission of Mr. Martin's blood-test results were improperly admitted, such error is harmless. However, the State's argument is fatally flawed in this respect as the only evidence that exists to support a conviction for operating a motor vehicle while intoxicated is the results of the blood-draw performed at St. Elizabeth. First, no one ever saw Mr. Martin driving the vehicle. Second, the accident was consistent with a slide-off caused by ice. Third, the field sobriety test was compromised due to multiple factors as admitted to by the police officers. Finally, the portable breathalyzer had not been calibrated, nor did the officer know the last time it was calibrated. Thus, the only evidence that exists to support a conviction for operating while intoxicated is the improperly admitted results of Mr. Martin's blood-draw.

As such, because the State failed to meet the appropriate foundational requirements, the trial court abused its discretion in admitting the blood test results. The remaining evidence is insufficient to support the conviction, and therefore, the conviction should be reversed and vacated.

REPLY ARGUMENT

I. The Trial Court Abused its Discretion in Admitting Appellant's Blood Test Results into Evidence Because the State Failed to Establish the Requisite Statutory Foundation for Admission of Same.

In this present matter, the State does not dispute that it relied solely on the testimony of Linenmeyer to lay the necessary foundation to admit Mr. Martin's blood-test results as required under Indiana Code section 9-30-6-6. Appellee's Br. pp. 12-18. Further, the State does not contest the fact that Linenmeyer was not acting under the direction of a physician when performing the "legal" blood-draw as required under Indiana Code section 9-30-6-6. Appellee's Br. pp. 13. Even more, the State does not contest the fact that there is no evidence of any written protocol for the legal blood collection procedures for St. Elizabeth. Appellant's App. Vol. II, pp. 79-83, 84-87.

Instead, the State only argues that Linenmeyer's testimony was sufficient to show that "Linenmeyer was acting under a protocol prepared by a physician when she drew Martin's blood." Appellee's Br. pp. 13. The State's argument, it appears, is based upon a misconception that any testimony about performing a blood-draw, whether done as a legal blood-draw or otherwise, is sufficient to lay the requisite foundation necessary under Indiana Code section 9-30-6-6. It is not.

In support of its position, the State, presents essentially three (3) separate arguments, each of which will be addressed in turn. Appellee's Br. 12-18. However, before addressing the merits of the State's argument, it is important to re-iterate the foundational requirements for admission of blood-test results found in Indiana Code section 9-30-6-6. Specifically, Indiana Code section 9-30-6-6 "provides that blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by [a] physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician." *Boston v. State*, 947 N.E.2d 436, 442-3 (Ind. Ct. App. 2011). Moreover, "**the foundation for admission of laboratory blood drawing and testing results, by statute, involves technical**

adherence to a physician's directions or **to a protocol prepared by a physician**." *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991) (emphasis added). Importantly, precedent dictates that "[**t]his is not a requirement that may be ignored**." *Combs v. State*, 895 N.E.2d 1252, 1256 (Ind. Ct. App. 2008) (emphasis added).

A. Linenmeyer's Testimony was Insufficient to Lay the Requisite Foundation for Admission of the Blood-Test Results as Required Pursuant to Indiana Code Section 9-30-6-6.

As mentioned above, the State contends that Linenmeyer's testimony was sufficient to show "Linenmeyer was acting under a protocol prepared by a physician when she drew Martin's blood." Appellee's Br. pp. 13. The State goes on to argue that "Martin . . . [ignores] the four pages of testimony wherein Linenmeyer describes the hospital's procedure for legal blood draws . . .". Appellee's Br. pp. 14. Unfortunately, the State provides no citation to these "four pages of testimony." Appellee's Br. pp. 14. Assuming the State is referencing the pages of testimony the State cited to in the preceding paragraph, that testimony is wholly insufficient to lay the proper foundation for the admission of Mr. Martin's blood test results under the controlling statute. Appellee's Br. pp. 13-14.

To expand, other than merely stating that there was "a policy and procedure" for legal blood draws, and that a physician created these protocols, Linenmeyer provided no additional details as to these alleged protocols. Tr. Vol. II, pp. 214. Linenmeyer's testimony does not provide any specificity as to what exactly these policies were under the alleged protocols, nor does Linenmeyer's testimony provide any particularity as to the procedures used for legal blood draws under the alleged protocols. Tr. Vol. II, pp. 214. Instead, Linenmeyer's testimony only provides a general overview of how she personally performs any type of blood draw, lacking any reasonable

inference that there was "technical adherence . . . to a protocol prepared by a physician." *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991).

For example, when questioned about the process Linenmeyer used for the blood-draw, Linenmeyer testified to the following:

> "Q. Okay so earlier we talked about that you fill all three tubes with one sample?
> A. Yes.
> Q. How do you do that?
> A. (Inaudible) CC syringe and then when I send one to the lab that tube is normally just needed about at least one ML for them to run it and then **I will just divvy up then the rest** that's in that tube into the tubes that's in the state kit.
> Q. Okay if the tubes were less then half full would there be a reason why?
> A It was **probably just the specimen that I got from the patient**. If the 10 CC didn't fill up all of the way.
> Q Have you been trained that if it wasn't filled up all of the way that you would need to conduct a second blood draw?
> A **If there was probably less then like 1 ML** in each of them then **I would probably would do another** preferable stick to get a bit amount of specimen in the tubes.
> Q Okay but as far as this case goes did you believe that you had a good amount of specimen to place into the tubes?
> A Yes.
> Q Okay. And then do you do anything with the tubes as far as do you handle them in any specific way?
> A **With any lab tube I think it's probably just what I'm used** to with our but normally would just send it back and forth **probably four or five times** before giving them off." Tr. Vol. II, pp. 223 (emphasis added).

As evidenced by Linenmeyer's repeated use of the word "probably" to describe the process she employs in performing a blood-draw prohibits any inference that Mr. Martin's blood-draw involved "technical adherence . . . to a protocol prepared by a physician." *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991).

Another example can be found during cross-examination, in which Linenmeyer testified to the following:

> "Q. You use the plastic tube with a needle on it.
> A. Yes.
> Q. And you stuck that needle in the arm.

> A. Yes.
> Q. And then you use the plunger and the syringe to draw out.
> A. Yes.
> Q. And you drew out ten CC's?
> A. **Probably** I can't remember back in 2017 exactly but **that's how much in my practice I would normally draw**." Tr. Vol. II, pp. 228 (emphasis added).

Again, Linenmeyer's use of the word "probably", coupled with her reference to how she "would normally draw" cannot lead to the inference that Linenmeyer performed the blood-draw with "technical adherence . . . to a protocol prepared by a physician." *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). Conversely, the only inference that can be gleaned from Linenmeyer's testimony is that Linenmeyer described how she performs blood-draws in general, regardless of whether it is a legal blood-draw.

This Court's decision in *Combs v. State* provides the controlling precedent in this case as the factual scenario in *Combs* is identical to this current matter. Specifically, in *Combs*, the defendant argued the trial court abused its discretion in admitting the blood-test results because the State had failed to lay the requisite foundation for same pursuant to Indiana Code section 9-30-6-6. 895 N.E.2d 1252, 1256 (Ind. Ct. App. 2008). The *Combs* Court agreed with Defendant, findings that "the State failed to present evidence that the person who collected his blood was a 'physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician[.]'" *Id*. at 1257 (citing, Indiana Code § 9-30-6-6).

In reaching this decision, the *Combs* Court first noted that "the State called Medical Technologist Smith to testify at trial about the process she used to collect Combs's blood sample." *Id*. The *Combs* Court recognized that the Medical Technologist, "testified about her educational background and professional experience drawing blood samples and conducting chemical analyses." *Id*. The *Combs* Court went on to hold that, "[w]hile Medical Technologist Smith's testimony tells us about the process employed to collect blood samples, it tells us nothing about

who developed the protocol or whether she acted under the direction of a physician." *Id*. at 1258. The *Combs* Court concluded that "[t]o accept the State's position that the testimony regarding the circumstances surrounding the blood draw laid a proper foundation for the admission of the blood test results would be to ignore the clear language of Indiana Code section 9-30-6-6." *Id*.

The same is true in this present matter. Linenmeyer's testimony does not provide insight into the process employed for legal blood-draws under the alleged protocols, nor does Linenmeyer's testimony provide any real insight into who created the alleged protocols. At most, Linenmeyer's testimony describes her general practice she had developed regarding her method of drawing blood. This is insufficient to lay the requisite foundation for admission of results from a legal blood draw.

Additionally, despite the State's claim that Mr. Martin "repeatedly mischaracterizes and misconstrues Linenmeyer's testimony," Mr. Martin mischaracterized and misconstrued nothing about Linenmeyer's generalized and generic testimony. Appellee's Br. pp. 14. This is best evidenced by the fact the State provides no analysis to support its assertion against Mr. Martin. Appellee's Br. pp. 14.

While the State would like to downplay Linenmeyer's contradictory testimony, the fact is the contradictions in Linenmeyer's testimony illustrates that there was not, and could not have been, "technical adherence . . . to a protocol prepared by a physician." *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). For example, first, when asked about her training as to filling test tubes with certain amounts of blood, Linenmeyer testified that she had never been trained as to a specific amount of blood each test tube needed to be filled. Tr. Vol. II, pp. 222.

However, during cross-examination, Linenmeyer testified that she learned, as part of her training to become an RN, that "certain tubes need a certain amount of blood in them and if there

is not enough, they won't be able to run it in the lab and they'll ask for a recollect." Tr. Vol. II, pp. 228. Directly thereafter, Linenmeyer went on to testify about the importance of obtaining the correct amount of blood for certain tubes. Tr. Vol. II, pp. 228. Specifically, Linenmeyer testified to the following:

> "Q. Okay and the important part of that is that it can lead to an incorrect result is that correct?
> A. Yes that's what it states.
> Q. And if it's over filled or under filled.
> A. Yes." Tr. Vol. II, pp. 228.

Yet, just several questions later, during cross-examination, Linenmeyer testified that she was never instructed that it could be problematic for certain test-tubes to be filled less than half. Tr. Vol. II, pp. 230. As the above testimony demonstrates, Linenmeyer's testimony is contradictory. Linenmeyer testified that she was never trained that certain tubes require a certain amount of blood while also testifying that she learned during her training as an RN that "certain tubes need a certain amount of blood in them and if there is not enough, they won't be able to run it in the lab and they'll ask for a recollect." Tr. Vol. II, pp. 228.

The importance of highlighting this contradictory testimony is to show Linenmeyer's testimony was insufficient to lay the foundation for admission of the blood-test results pursuant to Indiana Code section 9-30-6-6. Linenmeyer was unable to provide a consistent answer to the simple question of whether she was aware certain tubes require a certain amount of blood. If Linenmeyer was unable to answer this question, then any inference that Linenmeyer performed the blood draw with "technical adherence . . . to a protocol prepared by a physician" is prohibited. *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991).

Thus, because Linenmeyer's testimony was insufficient to show that Mr. Martin's blood-draw was done pursuant to a protocol prepared by a physician, the trial court abused its discretion in admitting the results into evidence.

B. Martin Never Argued that the State is Required to Present Written Protocols to Satisfy the Foundational Requirements of Indiana Code Section 9-30-6-6.

The State next makes the erroneous claim that "Martin attempts to narrow the requirements of Section 9-30-6-6 and create a new rule wherein the State cannot satisfy its burden under this section without admitting a written copy of the hospital procedures." Appellee's Br. pp. 15. Despite the State's erroneous and unsupported statements, Mr. Martin never advanced such a proposition as a simple review of Appellant's Brief would reveal.

Instead, Mr. Martin merely highlighted the undisputed fact that there is no evidence of any written protocol for the legal blood collection procedures for St. Elizabeth. Appellant's App. Vol. II, pp. 79-83, 84-87. Mr. Martin additionally highlighted the undisputed fact that, although the written protocols for legal blood draws at St. Elizabeth were requested during the discovery process, the State did not produce same. Appellant's App. Vol. II, pp. 79-83, 84-87. Moreover, Mr. Martin pointed out the undisputed fact that the State failed to introduce the alleged written protocols into evidence at the hearing, let alone protocols "prepared by a physician." Appellant's App. Vol. II, pp. 78-83, 84-87. Finally, Mr. Martin highlighted the undisputed fact that the State did not have the physician who approved or created the alleged protocols testify at the hearing because the State's position was that Linenmeyer's testimony was sufficient to establish the requisite foundation. Tr. Vol. II, pp. 247.

The purpose of highlighting these undisputed facts was to demonstrate that the only option the State had to lay the requisite foundation for admission of Mr. Martin's blood-draw test was

through the testimony of Linenmeyer. As demonstrated above, Linenmeyer's testimony was wholly insufficient to lay the requisite foundation for admission of same as there was no protocol elicited during her testimony. Thus, the trial court abused its discretion in admitting Mr. Martin's blood-test results.

C. Admission of Martin's Blood-Test Results is Not Harmless Error.

Finally, the State argues that any improper admission of Mr. Martin's blood-test results was "harmless." Appellee's Br. pp. 17. Yet, the State's logic is fatally flawed as the blood-test results are the only evidence that could prove Martin operated his vehicle while intoxicated ("OWI") under Indiana Code section 9-30-5-2.

As our Supreme Court explained, "[a]n error is harmless when it results in no prejudice to the 'substantial rights' of a party." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018). That is, "the basic premise holds that a conviction may stand when the error had no bearing on the outcome of the case." *Id*. This Court has noted that when reviewing a claim of reversible error, "[t]he question is not whether there is sufficient evidence to support the conviction absent the erroneously admitted evidence, but whether the evidence was likely to have had a prejudicial impact on the jury." *Hamilton v. State*, 49 N.E.3d 554, 556 (Ind. Ct. App. 2015). Finally, our Supreme Court adopted the following definition established by United States Supreme Court for non-constitutional reversible errors:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand ... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Miller v. State, 575 N.E.2d 272, 275 (Ind. 1991) (citing, *Kotteakos v. United State*, 328 U.S. 760, 764-65 (1946)).

In understanding why this legal blood draw is the only evidence that could sustain Mr. Martin's conviction for OWI, it is important to look at the surrounding facts of the night in question. That is, first, no one ever saw Mr. Martin driving the car. Tr. Vol. II, pp. 65, 66. There was not a dispatch that alerted Officer Watchbaugh that a vehicle had slid off the road. Tr. Vol. II, pp. 65. To the contrary, Officer Watchbaugh was only ever alerted of the situation because a citizen informed him at a gas station that a vehicle had slid off the road and a man was walking on the side of the highway. Tr. Vol. II, pp. 59. In fact, unless the citizen had alerted Officer Watchbaugh of the accident, he may have never encountered Mr. Martin. Tr. Vol. II, pp. 65.

Moreover, the highway where Mr. Martin slid off the side had especially icy roads the night in question; so much so that there were multiple accidents on the highway that night, one of which was fatal. Tr. Vol. II, pp. 123-124. Furthermore, one of the responding officers, Deputy Oliver, testified that the scene of the accident was consistent with someone sliding of the road due to hitting an ice patch. Tr. Vol. II, pp. 190. Thus, there is no inference from the scene of the accident that could support a conviction of OWI.

Next, while the State makes it seem as if there were multiple officers on the scene that night that reported smelling alcohol, that was not the case. Appellee's Br. pp. 18. There were three (3) officers that arrived on the scene at different times. Tr. Vol. II, pp. 59, 79-80, 155-156. The first officer to come into contact with Martin was Officer Dave Watchbaugh of the Mulberry Police Department. Tr. Vol. II, pp. 59-60. During direct examination, Officer Watchbaugh testified to the following:

> "Q And at that time did you observe any—we had talked about part of your training is to investigate operating while intoxicated cases correct?
> A Yes.
> Q As well as public intoxication cases correct?
> A Yes.
> Q So do you receive training on determining intoxication or impairment? Is that what you had been trained on?
> A Yeah.
> Q Okay and on that date did you observe any signs of intoxication or impairment?
> A No." Tr. Vol. II, pp. 62

Again, on cross-examination, Officer Watchbaugh testified that he did not observe any signs of intoxication during his interaction with Mr. Martin. Tr. Vol. II, pp. 67. Thus, Officer Watchbaugh, an officer trained in determining intoxication and impairment, observed no signs of impairment when interacting with Mr. Martin, nor smell any alcohol or marijuana. Tr. Vol. II, pp. 62, 67.

The first officer to arrive at the scene of Mr. Martin's vehicle slide-off was Officer Randy Martin of the Tippecanoe County Sherriff's Department and a Marshall with Dayton. Tr. Vol. II, pp. 76. Officer Martin testified to the following:

> "Q So at that point you developed in your mind that you were going to investigate this as an OWI.
> A Correct.
> Q But you didn't notice any odor of alcohol on his breath when you communicated with him.
> A Correct.
> Q In your report you didn't note that Mr. Martin's speech was slurred, you did not note that his speech was slurred.
> A Sure.
> Q Okay in your report you did not say that he had glassy eyes.
> A Correct." Tr. Vol. II, pp. 126.

Finally, the last officer to arrive at the scene was Deputy Dustin Oliver of Tippecanoe County Sheriff's Office. Tr. Vol. II, pp. 155-156. Specifically, Deputy Oliver arrived while Officer Martin was performing the field sobriety test on Mr. Martin. Tr. Vol. II, pp. 156. When Deputy Oliver approached Officer Martin and Defendant, Deputy Oliver reported smelling alcohol omitting from Defendant Martin. Tr. Vol. II, pp. 165.

Thus, of the three (3) officers that were involved, only the officer who was the last to arrive at the scene smelled alcohol on Martin. Tr. Vol. II, pp. 62, 67, 126, 165. This evidence is insufficient to support a conviction of OWI.

Next, the State argues that one officer noticed Martin's eyes were glassy. Appellee's Br. pp. 18. This officer the State references is Deputy Oliver. Tr. Vol. II, pp. 173. While Deputy Oliver testified that he noticed Mr. Martin's eyes were glassy, Deputy Oliver also testified that it was a cold night and Mr. Martin's eyes could have been glassy due to the cold. Tr. Vol. II, pp. 173. Thus, this evidence is insufficient to support a conviction of OWI.

The State also argues that Mr. Martin failed "the only field sobriety test performed." Appellee's Br. pp. 18. However, the officer that administered the field sobriety test, Officer Martin, admitted that, "by definition" he did not perform the test properly. Tr. Vol. II, pp. 104. According to the Standardized Field Sobriety Test ("SFST") manual, a field sobriety test not performed pursuant to proper procedures can be compromised, which Officer Martin agreed during his testimony. Tr. Vol. II, pp. 134. Furthermore, Officer Martin confirmed, via testimony, that he learned during his SFST training that failure to follow all protocols for administering field sobriety tests can lead to insufficient or inaccurate testing. Tr. Vol. II, pp. 133.

Moreover, during Mr. Martin's field sobriety test, Mr. Martin was facing a firetruck that was present on the scene. Tr. Vol. II, pp. 188. This firetruck had its emergency lights on the whole time. Tr. Vol. II, pp. 188. The only other officer present for the field sobriety test was Deputy Oliver, who agreed that the field sobriety test was compromised due to Martin facing the firetruck's emergency lights. Tr. Vol. II, pp. 188. Thus, the evidence of a "failed" sobriety test is insufficient to support a conviction for OWI because the test was compromised.

Finally, in regards to the portable breath test, Officer Watchbaugh confirmed that he had not calibrated his portable breath test, nor did Officer Watchbaugh know when the last time it was calibrated. Tr. Vol. II, pp. 70. As such, a "positive" result from an uncalibrated portable breath test is insufficient to support a conviction of OWI. Thus, the only means by which the State could prevail and meet its burden of proof beyond a reasonable doubt that Mr. Martin operated his vehicle while intoxicated was through the results of the legal blood-draw.

Our Supreme Court has made clear that "[i]t is the general rule in Indiana that the proponent of scientific test results bears the burden in each case to lay an evidentiary foundation establishing the reliability of the procedure used in that test." *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). In this matter, Linenmeyer's testimony was insufficient to lay the necessary foundation for admission of Mr. Martin's blood test results, as is required under Indiana Code section 9-30-6-6. Thus, the State failed to meet its burden to lay the requisite evidentiary foundation "establishing the procedure used in that test." *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). The State's failure to establish the requisite statutory foundation may not be overlooked or ignored. *See Combs*, 895 N.E.2d at 1256 (Ind. Ct. App. 2008) ("[t]his is not a requirement that may be ignored").

In summary, because the State failed to prove the requisite statutory foundation for admission of Mr. Martin's blood-test results, the trial court abused its discretion by admitting same into evidence. The remaining "evidence" is insufficient to support Mr. Martin's conviction, and as such, the trial court's error in admitting the blood-test results was not harmless. Thus, Mr. Martin's conviction should be reversed and vacated.

CONCLUSION

For the reasons stated herein, Mr. Martin respectfully requests reversal and all other relief just and proper in the premises.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Alexander N. Moseley, verify that this Appellant's Reply Brief contains no more than 7,000 words, including footnotes, as prescribed by Ind. App. Rule 44(E), notwithstanding those items excluded from page length limits under Ind. App. Rule 44(C), as determined by the word counting function of Microsoft Word 2010.

/s/ Alexander N. Moseley
Alexander N. Moseley

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served upon the following this 20th day of August, 2020 via the Court's electronic filing system:

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