20200236

FILED
IN THE OFFICE OF THE
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NOVEMBER 12, 2020
STATE OF NORTH DAKOTA

THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20200236

District Court No. 30-2019-CR- 00881

State of North Dakota,	)
	)
Plaintiff/Appellant,	)
	)
-v.-	)
	)
Nicholas Dean Lelm,	)
	)
Respondent/Appellee.	)

BRIEF OF THE PLAINTIFF/APPELLANT

****ORAL ARGUMENT REQUESTED****

APPEAL FROM THE ORDER SUPRESSING EVIDENCE
RELIEF ENTERED AUGUST 6, 2020 IN
MORTON COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT, NORTH DAKOTA
THE HONORABLE PAM NESVIG, PRESIDING

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Cases

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Oral Argument

Oral argument has been requested to further clarify Appellant's reasoning, and respond to respondent's arguments.

JURISDICTION

[¶ 1] The district court had jurisdiction under North Dakota Century Code Section 27-05-06. The North Dakota Supreme Court has jurisdiction under North Dakota Century Code Section 27-02-04.

STATEMENT OF ISSUES

[¶ 2] Whether the Search Incident to Arrest Exception to the Fourth Amendment Applies.

[¶ 3] Whether the Automobile Exception to the Fourth Amendment Applies.

[¶ 4] Whether the Inevitable Discovery Exception to the Fourth Amendment Applies.

STATEMENT OF THE CASE

[¶ 5] Nicholas Lelm (hereafter, Mr. Lelm), was arrested and charged with four controlled substances violations on August 28th, 2019; specifically Count I: Possession of a Controlled Substance (methamphetamine), Count II: Possession of a Controlled Substance (heroin), Count III: Possession of Drug Paraphernalia (other than marijuana) and Count IV: Possession of Drug Paraphernalia (marijuana). Appellant's Appendix 7-8. On January 4th, 2020, Mr. Lelm moved to suppress evidence acquired during a search of Mr. Lelm's backpack. Appellant's Appendix 11. The state responded on January 28th, 2020, and a hearing was set for March 11th, 2020. *See generally* Appellant's Appendix 13, 20. Thereafter, the parties stipulated to postponing the hearing, and the court granted the motion to continue. Appellant's Appendix 21. Due to the ongoing COVID-19 Pandemic, the hearing was again continued until August 5th, 2020. Appellant's Appendix 22. The court granted the motion to suppress on August 6th, 2020. *See generally* Appellant's Appendix 23. The state now appeals this order.

STATEMENT OF FACTS

[¶ 6] On August 28th, 2019, Officer Leo Belgarde Jr. (hereafter, Officer Belgarde) of the Mandan Police Department conducted a traffic stop in Mandan, ND upon a vehicle with two passengers. Appellant's Appendix 9. Officer Belgarde identified the driver as Mr. Jeramie Bloom (hereafter, Mr. Bloom) and the front seat passenger as Mr. Lelm. Appellant's Appendix 9. Officer Belgarde arrested Mr. Bloom due to outstanding warrants and upon probable cause that Mr. Bloom was driving while his license was suspended or revoked. Appellant's Appendix 10. Officer Scott Warzecha (hereafter, Officer Warzecha) who is the handler of K-9 Kupper, also arrived on scene. Appellant's Appendix 9. Mr. Bloom consented to a search of his vehicle. Appellant's Appendix 36, lines 8-9. Mr. Lelm, who had been seated in the front passenger seat, exited the vehicle at officer's direction. Appellant's Appendix 37, lines 6-11. As he exited, Mr. Lelm also removed a backpack from the vehicle, which he had previously held in his lap. Appellant's Appendix 37, lines 14-25. Mr. Lelm placed his backpack on the ground near the vehicle. Appellant's Appendix 38, lines 9-11. Mr. Lelm also indicated that there was a firearm in the vehicle. Appellant's Appendix 57, lines 18-24. Officer Belgarde then detained, pat searched, and secured Mr. Lelm in his patrol vehicle. Appellant's Appendix 60, lines 1-10.

[¶ 7] Officer Warzecha then directed K-9 Kupper to conduct a free air sniff around the vehicle. Appellant's Appendix 9. K-9 Kupper indicated on the front passenger door. Appellant's Appendix 65-66, lines 25-1. K-9 Kupper is trained to indicate when he detects specific controlled substances. Appellant's Appendix 66, lines 2-11. This indication meant that controlled substances were either present in the vehicle, recently in the vehicle, or that controlled substances had recently been ingested in the vehicle via smoking. Appellant's Appendix 68, lines 12-18. Relying on Mr. Bloom's consent and K-9 Kupper's indication,

Officer Belgarde conducted a search of the vehicle. Appellant's Appendix 36, lines 15-19. The search revealed controlled substance residue, and drug paraphernalia in the center console and the passenger side floorboard. Appellant's Appendix 9; Appellant's Appendix 36, lines 20-23.

[¶ 8] Thereafter, Officer Belgarde began to search Mr. Lelm's backpack, discovering additional controlled substances and paraphernalia, specifically heroin loaded into a syringe. Appellant's Appendix 9; Appellant's Appendix 40, lines 12-16. Mr. Lelm then complained of chest pain, and Officers called an ambulance for him. Appellant's Appendix 39, lines 7-13. Mr. Lelm was placed under arrest for possession of heroin, and paraphernalia. Appellant's Appendix 40, lines 12-16. After the ambulance arrived and Mr. Lelm was being examined by medical staff, Mr. Lelm indicated that he possessed additional controlled substances on his person, specifically over 50 grams methamphetamine. Appellant's Appendix 40-41, lines 23-8. After being cleared by medical staff, Mr. Lelm was transported to jail where the methamphetamine was recovered from Mr. Lelm's person. Appellant's Appendix 41-42, lines 20-5.

LAW AND ARGUMENT

Standard of Review

[¶ 9] When this court reviews the disposition of a motion to suppress, the court grants deference to the district court's findings of fact, and resolves ambiguities in factual evidence in favor of affirmance. *State v. Zwicke*, 2009 ND 129, ¶6, 767 N.W.2d 869. Questions of law, however, are reviewed de novo. *Id.*

I. The District Court Erred in Determining that the Search Incident to Arrest Exception to the Fourth Amendment Does Not Apply.

[¶ 10] The search incident to arrest exception to the warrant requirement should apply in this case. Under the Fourth Amendment to U.S. Constitution, as made applicable to the states by the Fourteenth Amendment, all persons are to be free from unreasonable searches and seizures. *Zwicke*, 2009 ND 129, ¶7. Generally, a warrant is required to conduct a valid search, however there are enumerated exceptions to the warrant requirement. *Id*. Evidence need only be suppressed if there is no warrant, and no exception applies. *Id*.

[¶ 11] One relevant exception to the warrant requirement is the search incident to arrest exception to the warrant requirement. *State v. Mercier*, 2016 ND 160, ¶21, 883 N.W.2d 478. Under this exception, law enforcement may conduct a search of the defendant's person if there is probable cause to affect the arrest, and the arrest is substantially contemporaneous to the search. *Id.* For example, in *State v. Mercier*, the backpack of a subject was lawfully searched, even though he was not in possession of the backpack at the time of the arrest. *Id.* at ¶37. In *Mercier*, the defendant became the subject of an investigation after law enforcement received a report of a suspicious person which matched the defendant's description. Law enforcement contacted the defendant who identified himself as Dewayne Liggins. *Id*. at ¶3. Because law enforcement had prior interactions with the real Dewayne Liggins, they were aware that the defendant had provided a false name and asked for identification. *Id*. The defendant indicated that his identification was in his backpack across the street, which law enforcement retrieved for him, based upon his description. *Id*. The defendant then indicated that there was a knife in the backpack, and therefore, for officer safety, the defendant was placed in hand cuffs and pat searched. *Id*. The search revealed two identification cards, one belonging to Dwayne Liggins and the second belonging to Claude Mercier. *Id.* Law enforcement found marijuana as well. *Id*. Dispatch indicated that Claude

Mercier had active warrants, and therefore his backpack was searched. *Id*. The search of the backpack revealed methamphetamine, and drug paraphernalia. *Id*. Mercier was then arrested for false information to law enforcement, and various controlled substance violations. *Id.*

[¶ 12] In that case the defendant challenged the constitutionality of the search. The defendant asserted that because the backpack was not within his immediate control, the search incident to arrest exception to the warrant requirement did not apply. *Id* at 24. In holding against him, this court stated that "there is no requirement that the arrestee be within reaching distance or have the item within his immediate control once it is seized as part of the lawful arrest." *Id* at ¶33. Instead the question in determining if a search is appropriate is whether a particular personal item should be considered part of the arrestee, which is in turned determined based upon whether the arrestee had "actual exclusive possession at or immediately preceding the time of arrest. *Id* at ¶34 *citing State v. Brock*, 184 Wash.2d 148 ¶12, 355 P.3d 1118 (2015).

[¶ 13] This court further explained that the safety and evidence concern associated with the search incident to arrest doctrine flow to personal items taken into custody subsequent to an arrest, and therefore, when there is a lawful arrest, "no additional justification beyond the lawful arrest is necessary to justify the search." *Id* at ¶37.

[¶ 14] Here, there is a valid search incident to arrest. First, there is probable cause to affect an arrest for possession of drug paraphernalia. This fact was developed on direct examination, cross examination, and in the states closing arguments:

> Mr. Gunderson: "Okay. Prior to the backpack being searched, was Nicholas Lelm going to be arrested for paraphernalia with the vehicle and the drugs within the vehicle?"

Officer Belgarde: "Yes. For the glass pipes on the floor and the empty baggy of residue."

Appellant's Appendix 39-40, lines 25-4

. . .

Mr. Weatherspoon: "Okay. So at this point, you believe you have probable cause to arrest Mr. Lelm for the drug paraphernalia found in the vehicle – from Mr. Bloom's vehicle; correct?"

Officer Belgarde: "yes."

Mr. Weatherspoon: "based on the baggy with reside (sic) that was found in the center console of Mr. Bloom's vehicle; correct? Is that right, Officer Belgarde?"

Officer Belgarde: "And the pipes."

Appellant's Appendix 52, lines 18-25; Appellant's Appendix 53, line 1, 16-25

. . .

Mr. Gunderson: "Also he was never free to leave, judge. I think that's an important point that he was going to be arrested. You also have the portion where law enforcement found the drugs in his location. This was prior to the search of the backpack. He would have been searched as, I guess, search incident to arrest of not only Mr. Bloom but of his person[.]"

Appellant's Appendix 76, lines 15-21

[¶ 15] Second, the search was substantially contemporaneous to the arrest. Like in *Mercier*, where law enforcement discovered marijuana on the defendant and thereafter searched his backpack, *Id* at ¶3, here, law enforcement discovered drug paraphernalia in the passenger seat where Mr. Lelm had been sitting, and thereafter searched his backpack. Furthermore,

this court in *Mercier* clearly articulated a search incident to arrest is still valid even if conducted before a formal arrest as long as the fruit of the search was not necessary for the arrest, as the Court in *Mercier* provided:

> The United States Supreme Court has also held that so long as probable cause to arrest exists before the search, and the arrest is substantially contemporaneous, a warrantless search preceding arrest is reasonable under the Fourth Amendment. *See Rawlings v. Kentucky*, 448 U.S. 98, 111, 111 n. 6, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest, rather than vice versa," so long as the fruits of the search were "not necessary to support probable cause to arrest.").

[¶ 16] Here, just as in *Mercier*, there was a personal item that was no longer within reach of the suspect, however, it was still validly searched. Here as in *Mercier*, the defendant had been in actual exclusive possession just prior to the search of the backpack, as it had been removed from his hands, and then placed near the vehicle until it was ultimately searched.

[¶ 17] The defendant will likely argue that these cases are distinct, because Mr. Lelm was arrested for possession of heroin discovered in the backpack, meaning that the search incident to arrest doctrine should not apply. This ignores the fact that Mr. Lelm was already going to be arrested for possession of drug paraphernalia which was found during the automobile search. While he was not formally arrested until after the search of the backpack, this too was addressed in *Mercier*.

[¶ 18] Therefore, this was a valid search incident to arrest and the court erred in suppressing the results of this search.

II. The District Court Erred in Determining that the Automobile Exception to the Fourth Amendment Does Not Apply.

[¶ 19] The district court erred in determining that the automobile exception to the Fourth Amendment does not apply in this case. Another exception to the warrant requirement is the automobile exception. *State v. Gefroh*, 2011 ND 153 ¶8, 801 N.W.2d 429. The purpose of this exception is the prevent suspects of criminal offenses from disposing of evidence via a readily moveable vehicle, which the court states creates an exigent circumstance that justifies the omission of a warrant. *Id.* Under this exception, an automobile may be searched without a warrant if there is probable cause to believe that evidence of a crime is present. *Zwinke*, 2009 ND 129, ¶9, 767 N.W.2d 869. This court has stated that probable cause exists when "certain identifiable objects are probably connected with criminal activity and are probably to be found at an identifiable place." *Id; citing State v. Wamre*, 1999 ND 164, ¶6, 599 N.W.2d 268. The United States Supreme Court has also extended the automobile exception to containers or packages of the vehicle. This Court has previously acknowledged those findings by referencing the following in Its holding in State v. Reis, 2014 ND 30, 842 N.W.2d 845, finding:

> The scope of a warrantless search based on probable cause is no narrower-and no broader-than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." *United States v. Ross*, 456 U.S. 798, (1982). "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825. This applies equally to all containers, and includes the ability to search a locked container if the container may conceal the object of the search. *Id.* at 822. A showing of individualized probable cause for each container searched is not required.

[¶ 20] The United States Supreme Court drew a bright line rule by which to guide law enforcement official and lower courts in advancing the practical considerations involved in

an automobile search exception which would be defeated if packages found in the vehicle could not be searched without a warrant.

[¶ 21] The automobile exception applies to not only all object in the vehicle but also objects that are within a passenger's control. *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999).

[¶ 22] For example, in *Houghton*, the court reverse a lower court ruling upholding a suppression motion for an automobile search. *Id.* at 296. In that case, law enforcement developed probable cause that there existed evidence of controlled substances in the vehicle based on their observation of the driver possessing a syringe in plain view. *Id.* at 299. Three passengers were removed from the vehicle, one male (the driver) and two females, and the vehicle was searched. *Id.* The search revealed a purse which ultimately contained methamphetamine. *Id.* In that case the Supreme Court determined that the search of the purse was valid under the automobile exception, because the search could reasonably be extended to containers of passengers within the automobile. *Id.* at 302.

[¶ 23] Additionally, the United States Supreme Court in *United States v. Johns*, 469 U.S. 478, (1985), extended the exception for packages in *Ross* to the warrantless search of packages that were removed, seized and later searched three days later in a different location holding a warrant was not necessary to satisfy the practical considerations which was justified in *Ross*. The Court's analysis in *Johns* was:

> Because the officers had probable cause to believe that the trucks contained contraband, any expectation of privacy in the vehicles or their contents was subject to the officers' authority to conduct a warrantless search, and the warrantless search of the packages was not unreasonable merely because the officers returned to DEA headquarters and placed the packages in the warehouse rather than immediately opening them

[¶ 24] Here, Mr. Lelm was a passenger Mr. Blooms vehicle. Mr. Bloom immediately arrest on other charges and at that time the backpack was in the vehicle. Officer Belgarde requested

a K-9 free-air sniff. Before the air sniff was conducted Officer Belgarde directed Mr. Lelm to exit the vehicle. As Mr. Lelm exited the vehicle Mr. Lelm removed a backpack. At this time Mr. Lelm told law enforcement a gun was located within the vehicle. Law enforcement placed the backpack down and detained Mr. Lelm. A dog sniff was conducted and it was determined there was probable cause to search the vehicle for controlled substances based upon K-9 Kupper's indication on the vehicle, specifically on the front passenger side of the vehicle where Mr. Lelm was removed and the backpack was previously located.

[¶ 25] Officers searched the vehicle including the area in which Mr. Lelm was seated. Law enforcement found traces of controlled substance and paraphernalia within the vehicle's center console, as well as, along the passenger seat floorboard where Mr. Lelm was seated. After law enforcement determined the vehicle was indeed transporting controlled substances they searched the backpack that was found in the vehicle.

[¶ 26] The district count's holding relied upon the fact that the backpack was not actually in the vehicle at the time of the search. Appellant's Appendix 26, ¶11. This goes against the scope and purpose of the automobile exception.

[¶ 27] The United State Supreme Court in *Ross* drew on the original description set out in *Carol v. United States*, 267 U.S. 132 (1925) of the scope of warrantless searches pursuant to the automobile exception to the warrant requirement holding that, "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search," *Id*.

[¶ 28] Here, the backpack was an object of the vehicle and was seen by law enforcement prior to the occupants exiting. A dog sniff was conducted on the vehicle and police obtained valid probable cause to search the vehicle for controlled substances. Law enforcement had

previously testified that the Police K-9 indicated on the vehicle and a Police K-9 will indicate on odors of controlled substances that are present or lingering odors from a previous presence that had been removed. Mr. Lelm does not argue the extent of probable cause to search the vehicle. There was probable cause to search the vehicle and all the contents the vehicle contained due to the concern of ready destruction or concealment of evidence which an automobile provides.

[¶ 29] Law enforcement, nonetheless, wait to search the backpack until traces of controlled substances and paraphernalia are found within the center console next to where Mr. Lelm was seated and paraphernalia along the floorboard of Mr. Lelm's seat. At this point, law enforcement not only have probable cause the vehicle is transferring controlled substances and paraphernalia, they have actually found the traces of controlled substances and the paraphernalia.

[¶ 30] Law enforcement, under the automobile exception are not required to obtain a warrant for the vehicle and all of the vehicle's containers, contents and packages that could conceal controlled substances and paraphernalia. The backpack that was within the vehicle at the time of the lawful stop rendering it a container of the vehicle. That does not change because it was removed by the passenger and seized by law enforcement prior to the K-9 air-sniff. Probable cause was not only found during the K-9 sniff, but was found a second time when law enforcement found the controlled substances within the vehicle.

[¶ 31] The District Court's ruling that the backpack was outside during the K-9 sniff and therefor the automobile exception does not apply is incorrect. This would go against the very purpose, holdings, and caselaw that has been provided by the United States Supreme Court. The argument that the backpack was not present and thus not part of the probable cause that

was established by the K-9 sniff an incorrect application of the automobile exception. The automobile exception does not require probable cause for every location, area, compartment, or container. Simply having probable cause for any part of the vehicle will provide law enforcement with the authority to search the entirety of the vehicle and all of its containers without a warrant. In his case, nonetheless, there was additionally probable cause established when law enforcement found the controlled substances inside the vehicle. Again, the scope is not to any one object or container within the vehicle. If any probable cause is found from any area or location of the vehicle law enforcement are allowed to search every compartment, every location, every container, that could be concealing the purpose for the search.

[¶ 32] The automobile exception applies not only to the search contemporarily but to objects that are removed and secured in a different location as provided in *United States v. Johns.* Addressing all the caselaw, this case is no different, and again where police obtained probable cause to search a vehicle the scope of that search extends to all compartments and containers, luggage, and/or packages. Here, the backpack came from the vehicle and it is without argument contents of the vehicle law enforcement had probable cause to search.

[¶ 33] Therefore, the automobile exception should apply in this case, and the district court erred in suppressing the evidence.

III. The District Court Erred in Determining that the Inevitable Discovery Doctrine Exception to the Fourth Amendment Does Not Apply.

[¶ 34] The district court erred in determining that the inevitable discovery doctrine exception to the Fourth Amendment does not apply in this case. One such exception is the inevitable discovery doctrine. *State v. Hollis*, 2019 ND 163, ¶19, 930 N.W.2d 171. Under the inevitable discovery doctrine, an officer may conduct a search of a person without a

warrant if a two prong test is satisfied. *Id*. First, officers must not be acting in bad faith in order to accelerate the discovery of evidence in question. *Id*. Second, the state must show that the evidence would have been found without the unlawful activity and must show how the evidence would have been discovered. *Id*.

[¶ 35] Here, the first prong is satisfied. The court specifically notes that there is "no indication the officers acted in bad faith when they performed the search of the backpack." Appellant's Appendix 28, ¶15. Still, the court is incorrect as to the second prong. Here, the evidence would have been discovered notwithstanding the early search. Even without the automobile exception, the evidence would have been discovered for two reasons: first Mr. Lelm would have been arrested due to the paraphernalia discovered in the vehicle. This means that his property would have been searched incident to his arrest, and the heroin would have been discovered. Second, Mr. Lelm later admitted to being in possession of methamphetamine. Officer Belgarde confirmed that he was in fact in possession of methamphetamine. Thereafter, Mr. Lelm would have been arrested for possession of methamphetamine, notwithstanding the heroin which had already been discovered and the paraphernalia found under Mr. Lelm's seat. Therefore, Officer Belgarde would have taken Mr. Lelm into custody and conducted a search incident to arrest of all things on Mr. Lelm's person, including his backpack. Therefore, the heroin would have been discovered.

[¶ 36] The court erred in determining that the inevitable discovery doctrine does not apply.

CONCLUSION

[¶ 37] WHEREFORE, the State respectfully requests that this Court overrule the district court's order suppressing evidence in *State v. Lelm.*

Dated this November 12, 2020.

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CONCLUSION

[¶ 37] WHEREFORE, the State respectfully requests that this Court overrule the district court's order suppressing evidence in *State v. Lelm.*

Dated this November 19, 2020.

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CERTIFICATE OF COMPLIANCE

[¶31] The undersigned certifies that the Appellee's Brief contains fifteen (18) pages consisting of the cover page through the conclusion and signature block, thereby complying with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated this November 12, 2020.

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CERTIFICATE OF COMPLIANCE

[¶38] The undersigned certifies that the Appellee's Brief contains seventeen (17) pages consisting of the cover page through the conclusion and signature block, thereby complying with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated this November 19, 2020.

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STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF MORTON SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota,	)	
	)	
Plaintiff/Appellant;	)	
	)	**CERTIFICATE OF SERVICE**
vs.	)	**VIA ELECTRONIC FILE AND SERVE**
	)	
Nicholas Lelm,	)	Case# 30-2019-CR-00881
	)	Supreme Court No. 20200236
	)	
Defendant/Appellee.	)	

.....

[¶1] I hereby certify a true and correct copy of the **APPELLANT BRIEF AND APPEXDIX** was served on the Defendant's counsel, Joshua Weatherspoon, by electronic mail through the electronic file and serve system to: josh@MULLOYLAW.COM.

Dated this 12th day of November, 2020.

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STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF MORTON SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota, Plaintiff/Appellant; vs. Nicholas Lelm, Defendant/Appellee.	**CERTIFICATE OF SERVICE** **VIA ELECTRONIC FILE AND SERVE** Case# 30-2019-CR-00881 Supreme Court No. 20200236

[¶1] I hereby certify a true and correct copy of the **APPELLANT BRIEF AND APPEXDIX** was served on the Defendant's counsel, Joshua Weatherspoon, by electronic mail through the electronic file and serve system to: josh@MULLOYLAW.COM.

Dated this 19th day of November, 2020.

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