No. 01-19-00864-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

Ted Dahl, *appellant*
v.
State of Texas, *appellee*

On Appeal from the County Court at Law No. 4
Brazoria County, Texas
Tr. Ct. No. 237873

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Nature of the case: Appellant was charged with speeding (CR 5).

Course of proceedings: Appellant was found guilty in municipal court and appealed to county court where a trial de novo with a jury was conducted (RR Vol 2). The jury found appellant guilty and assessed a fine of $200.00. (CR 36).

Trial court disposition: The trial court signed a judgment consistent with the jury verdict (CR 46).

ISSUE PRESENTED

Whether the instruction telling the jury that a "*speed in excess of the zone or posted speed is prima facie evidence that the speed is not reasonable or prudent and that the speed is unlawful*" lowers the State's burden to prove its case beyond a reasonable doubt in violation of due process.

STATEMENT OF FACTS

Appellant was ticketed for driving 66 miles per hour in a 55 mile per hour speed zone on Highway 36 on the outskirts the Village of Jones Creek, a town of 2,020 people located in Brazoria County (*see* www.villageofjonescreektexas.com) (CR 6). Appellant was found guilty in the Jones Creek municipal court and fined $200 (CR 9). Appellant, who has a commercial driver's license, appealed to county court for a trial de novo (CR 11).

At trial in the county court, the application paragraphs of the jury charge told the jury as follows:

> You must determine whether the State has proved, beyond a reasonable doubt, that the defendant, Ted Emil Dahl, on or about the 22nd day of November 2017, in Brazoria County, Texas, did then and there drive and operate a motor vehicle in and upon a public highway, to wit: State Hwy 36 @ Smith Street, within the territorial limits of the City of Jones Creek, and within an urban district, at a speed which was greater than was then and there reasonable and prudent under the conditions then existing, having regard to the actual and potential hazards, to wit: at a speed of 66 miles per hour, at which time and place the posted speed limit was 55 miles per hour, and at such time was not operating an authorized emergency vehicle responding to calls was not a police patrol; and was not a physician or ambulance responding to an emergency call.
>
> If you all agree the State has proved, beyond a reasonable doubt, each of the elements listed above,

> you must find the defendant "guilty" and assess a fine of not less [than] one dollar ($1.00) and not more than two hundred dollars ($200.00).
>
> If you all agree the State has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant "not guilty."

(CR 41-42). Over Appellant's objection, the jury charge also included the following instruction:

> A speed in excess of the zone or posted speed is *prima facie* evidence that the speed is not reasonable or prudent and that the speed is unlawful.

(CR 41). Appellant's specific objection to inclusion of this instruction within the jury charge was the following:

> That sentence should not be included in the jury charge because it improperly shifts the burden from the State, their higher burden of -- their higher burden that they have in a criminal case has shifted to the defense to disprove it because the whole methodological concept of prima facie is to shift the burden [to the defense]. So if there's evidence in the record of "X" and you tell the jury that "X" is prima facie evidence if something is proven, that means we've got to disprove it. So that violates his constitutional right to not have the burden put on him. So that whole sentence should be removed.

(RR Vol. 2, p. 58).

In its closing argument, the State latched on this portion of the jury charge and told the jury as follows:

> Then [defense counsel] says that Mr. Dahl's driving ... was reasonable and prudent. That's what the crux of this case is. The law states that a speed in excess of the zone posted is prima facie evidence that the speed is not reasonable and prudent, that the speed is unlawful.
>
> In this case it was 55 miles per hour. He was going 66. He was speeding. Now, you are allowed to go over the posted speed limit if you fall under one of these four categories. The first one is operating an authorized emergency vehicle responding to an emergency call. Deputy Pierson said he wasn't, and even Mr. Dahl said he wasn't doing that. Then it says if you're operating a motor vehicle engaged in police patrol. Again, the deputy said he wasn't and even Mr. Dahl said he wasn't. Third was operating an ambulance responding to an emergency call. The deputy and the defendant said he wasn't doing that. Lastly, the deputy and the defendant stated he was not a physician responding to an emergency call.
>
> Those are the four ways that if you're speeding -- if you're an ambulance driver, if you're a police officer, things of that nature. Not only did the officer state this but even the defendant in his own words said he didn't fall under any of these four categories.
>
> There was zero reason for the defendant to go over that speed limit. He wants to say that speed limit signs are just a suggestion and if there's no traffic on the road, he can go as fast as he wants to. That is not the law in the state of Texas. The law applies to the defendant just as it applies to everyone else. He was speeding. He should deserve the consequences for that.

(RR Vol. 2, pp. 75-76).

The jury found defendant guilty and assessed a fine of $200 (CR 36). The trial court signed a judgment consistent with the jury verdict, and Appellant appealed to this court (CR 46).

As for the testimony at trial, Jones Creek police officer Brian Pierson said that on November 22, 2017, at 8:00 a.m., based on a radar reading, he stopped Appellant on Highway 36 on the outskirts of Jones Creek for driving 66 miles per hour where there was a sign posting the speed limit at 55 miles per hour (RR Vol. 2, pp. 16-19, 32-33). Officer Pierson said that Appellant's driving 66 miles per hour was not "reasonable and prudent under the current conditions then existing" because Appellant's speed was in "in excess of the [posted] speed limit" (RR Vol. 2, p. 20). Officer Pierson testified based on his reviewing the ticket and otherwise did not specifically recall the events of the stop because it was a routine stop, so much time had passed, and he had given so many other tickets since then (RR Vol. 2, pp. 26-37, 40).

Appellant said that he has a commercial driver's license, he lives in Freeport, that at the time of the stop he was coming from Bay City where he had purchased truck parts (RR Vol. 2, pp. 24, 44). He described the location of the stop as the country and said that he did

not see the speed limit sign (RR Vol. 2, pp. 46-49). He told the jury that he did not disagree that he was driving 66 miles per hour, that had he seen the sign he would have slowed down to the posted speed limit, that he does not make it a habit of driving above the posted speed limits, and that given the circumstances he saw where he was driving, his speed was reasonable and safe and was not excessive for that stretch of highway (RR Vol. 2, pp. 48-50). He explained that there was no traffic, it was a sunny day, that he is always a careful driver (RR Vol. 2, pp. 53-54).

SUMMARY OF ARGUMENT

The legislature has not made it an offense *per se* to drive above the posted speed limit. Rather, the legislature has made it an offense to "drive at a speed greater than is reasonable and prudent under the circumstances then existing." The posted speed is evidence of the surrounding circumstances. Because it is not an offense to drive above the posted speed limit, it was error for the trial court to instruct the jury in Appellant's speeding trial that a "speed in excess of the zone or posted speed is *prima facie* evidence that the speed is not reasonable or prudent and that the speed is unlawful." This instruction is a constitutionally prohibited mandatory presumption which lowers the State's burden to prove its speeding case beyond a reasonable doubt.

ARGUMENT AND AUTHORITIES

a. Why this case is significant.

This case presents an issue of first impression on a constitutional question that impacts thousands upon thousands of speeding prosecutions across the entire State of Texas. The issue has never been squarely confronted and dealt with by our appellate courts because of the *de minimus* problem of Joe Q citizen taking on the Leviathan governmental apparatus over a mere $200 fine. It is way easier to just pay and move on with one's life. Meanwhile, if the arguments in this brief are correct, the constitutional violations occur on a gargantuan scale. Appellant has brought this significant issue before this Court as a matter of principle. This Court should take this opportunity for the greater good of our State and clarify with a full Opinion an area of law that directly or indirectly impacts anyone who drives on Texas roadways.

b. The offense of speeding, its elements, and the relevance of pre-set unposted speeds and posted speed signs.

The law does not state that a speeding violation occurs when a driver fails to drive at the speed posted on a speed-limit sign; rather, the law states that "[a]n operator may not drive at a speed greater than is reasonable and prudent under the circumstances then existing." TEX. TRANS. CODE § 545.351(a). In this regard, the Transportation Code lists a variety of factors that must be taken into consideration in making the determination as to whether a driver has driven at a reasonable speed on a given occasion:

> Sec. 545.351. MAXIMUM SPEED REQUIREMENT.
>
> (a) An operator may not drive at a speed greater than is reasonable and prudent under the circumstances then existing.
>
> (b) An operator: (1) may not drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for actual and potential hazards then existing; and (2) shall control the speed of the vehicle as necessary to avoid colliding with another person or vehicle that is on or entering the highway in compliance with law and the duty of each person to use due care.
>
> (c) An operator shall, consistent with Subsections (a) and (b), drive at an appropriate reduced speed if:
>
> (1) the operator is approaching and crossing an intersection or railroad grade crossing;

> (2) the operator is approaching and going around a curve;
>
> (3) the operator is approaching a hill crest;
>
> (4) the operator is traveling on a narrow or winding roadway; and
>
> (5) a special hazard exists with regard to traffic, including pedestrians, or weather or highway conditions.

TEX. TRANS. CODE § 545.351. Here, the trial court included the language of subsections (a) and (b) in the jury charge, and excluded the language of subsection (c). In this regard, the jury charge states:

> A person commits the offense of speeding if he operates a motor vehicle at a speed greater than is reasonable and prudent under the circumstances then existing. An operator may not drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for actual and potential hazards then existing; and shall control the speed of the vehicle as necessary to avoid colliding with another person or vehicle that is on or entering the highway in compliance with the law and the duty of each person to use due care.

As for posted speed-limit signs, the Transportation Commission is authorized under Subchapter H of the Transportation Code to determine whether "a *prima facie* speed limit ... is unreasonable or unsafe on a part of the highway system." TEX. TRANS. CODE §

545.353(a).[1] And regarding such a determination, Subchapter H states:

> A *prima facie* speed limit that is declared by the commission under this section is effective when the commission erects signs giving notice of the new limit. A new limit that is enacted for a highway under this section is effective at all times or at other times determined.

Id. at § 545.353(c). The term "*prima facie*" within section 545.353(c) is referring to section 545.352(a), which states:

> A speed in excess of the limits established by Subsection (b) or under another provision of this subchapter is *prima facie* evidence that the speed is not reasonable and prudent and that the speed is unlawful.

TEX. TRANS. CODE § 545.352(a).[2]

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[1] A similar provision allows municipalities to set speed limits. *See* TEX. TRANS. CODE § 545.356.

[2] When, as in this case, the Transportation Commission or a municipality has set speed limits with a posted sign, Subsection (b) is inapplicable. In spite of that, Subsection (b) states as follows:

> (b) Unless a special hazard exists that requires a slower speed for compliance with Section 545.351(b), the following speeds are lawful:
>
> (1) 30 miles per hour in an urban district on a street other than an alley and 15 miles per hour in an alley;
>
> (2) except as provided by Subdivision (4), 70 miles per hour on a highway numbered by this state or the United States outside an urban district, including a farm-to-market or ranch-to-market road;

In other words, the law of speeding adopted by the legislature is that (1) it is a violation a driver drives at a speed greater than is reasonable and prudent under the circumstances then existing, *id*. at § 545.351(a), (2) presumably safe speeds for certain roads are pre-set without a sign, *id*. at § 545.352(b), unless the Transportation Commission, *id*. at § 545.353(a), or a municipality, *id*. at § 545.356, determines a different speed is appropriate and posts a speed limit sign on the roadway, and (3) the pre-set or posted are *prima facie* evidence that a higher speed is not reasonable and prudent and is unlawful, *id*. at § 545.352(a). Thus, the elements of a speeding offense are driving at a speed greater than is reasonable and prudent under

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> (3) except as provided by Subdivision (4), 60 miles per hour on a highway that is outside an urban district and not a highway numbered by this state or the United States;
>
> (4) outside an urban district: (A) 60 miles per hour if the vehicle is a school bus that has passed a commercial motor vehicle inspection under Section 548.201 and is on a highway numbered by the United States or this state, including a farm-to-market road; or (B) 50 miles per hour if the vehicle is a school bus that: (i) has not passed a commercial motor vehicle inspection under Section 548.201; or (ii) is traveling on a highway not numbered by the United States or this state;
>
> (5) on a beach, 15 miles per hour; or
>
> (6) on a county road adjacent to a public beach, 15 miles per hour, if declared by the commissioners court of the county.

TEX. TRANS. CODE § 545.352(b).

the circumstances then existing. Whether an accused has driven below or above the preset or posted speeds is merely one of the circumstances to be factored into the determination of whether a speeding offense occurred. It is possible, depending on the circumstances, for a driver to commit a speeding offense by driving *below* the pre-set or posted speeds, just as it is possible, depending on the circumstances, for a driver not to commit a speeding offense by driving *above* the pre-set or posted speeds.

c. How the jury charge reduced the State's burden to prove the elements of the speeding charge beyond a reasonable doubt.

In this appeal, a 55 mile per hour sign was posted where Appellant was driving. However, the State was required to prove beyond a reasonable doubt, not that Appellant was driving above the posted speed, but that he was driving "at a speed greater than is reasonable and prudent under the circumstances then existing." TEX. TRANS. CODE § 545.351(a). The trial court's jury charge improperly relieved the State of its burden of proving the speeding charge beyond a reasonable doubt by inclusion of the following instruction:

> A speed in excess of the zone or posted speed is prima facie evidence that the speed is not reasonable or prudent and that the speed is unlawful.

"[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). To insure a jury focuses solely on the evidence, due process requires the jury charge to include instructions on the presumption of innocence[3] and the State's burden to prove its case beyond a reasonable doubt.[4] *Id.* at 488-490. Reasonable doubt is a heavy burden so as to force the jurors to focus solely on the evidence thereby decreasing the likelihood of convicting

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[3] *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("[The] presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

[4] *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("The government must prove beyond a reasonable doubt every element of a charged offense."); *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Miles v. United States*, 103 U.S. 304, 312 (1880) ("The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.").

an innocent person.[5] Thus, when a jury charge has the effect of relieving the State of its burden of proving the elements of the offense beyond a reasonable doubt, the jury charge violates the accused's constitutional right to due process. *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) ("When a jury charge has the effect of relieving the State of the burden of proof enunciated in *Winship* ... the instruction therefore represents constitutional error.").

Here, the jury was instructed that "[a] speed in excess of the zone or posted speed is *prima facie* evidence that the speed is not reasonable or prudent and that the speed is unlawful." The term "*prima facie*" was not defined in the jury charge but is commonly known to mean that a fact has been established until proven otherwise.[6] That is, the jury was told to accept the fact that Appellant

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[5] *Victor*, 511 U.S. at 5-22 (discussing the difficulty of defining reasonable doubt but acknowledging that whatever definition is given the message to the jury should be that the State's burden is heavy and the focus of decision should be on the evidence); *see also id*. at 23 (Ginsburg, J., concurring) ("I agree with the Court that the reasonable doubt instruction given in these cases, read as a whole, satisfy the Constitution's due process requirement. As the Court observes, the instructions adequately conveyed to the jurors that they should focus exclusively upon the evidence and that they should convict only if they had an 'abiding conviction' of the defendant's guilt.") (citation omitted).

[6] All dictionaries, new and old, provide similar definitions for the phrase. For example,

BLACK'S LAW DICTIONARY (7th ed. 1999) states:

drove at an unreasonable and imprudent speed and that his speed was unlawful because he drove above the posted speed *unless Appellant proved otherwise.* In other words, the jurors were told that Appellant was guilty if he drove above the posted speed, unless Appellant showed otherwise. That is simple not what the legislature sais in the speeding statute. Therefore, the State was relieved of its burden to prove beyond a reasonable doubt that Appellant had driven "at a speed greater than is reasonable and prudent under the circumstances then existing" by merely showing that Appellant drove above the posted speed.

> **Prima facie** – Sufficient to establish a fact or raise a presumption unless disproved or rebutted.

WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (1994) states:

> **prima facie** – 1. At first appearance; at first view, before investigation. 2. Plain or clear; self-evident; obvious.

OXFORD ENGLISH DICTIONARY (OED) (1989) states:

> **Prima facie** – At first sight; on the fact of it; as appears at first without investigation.

BALLENTINE'S LAW DICTIONARY (3d ed. 1969) states:

> **Prima facie** – At first sight. In reference to evidence, adequate as it appears, without more.

THE NEW CENTURY DICTIONARY (7th ed. 1936) states:

> **Prima facie** – At first appearance; at first view, before investigation: a phrase sometimes used adjectively (as, *prima facie* evidence, in *law*, evidence sufficient to establish a fact, or to raise a presumption of fact, unless rebutted).

Presumptions are common in the law and serve useful purposes, if properly employed. *Ulster Cnty Ct. v. Allen*, 442 U.S. 140, 156 (1979). In the context of a jury charge in a criminal case, permissive presumptions (one the jury is free to accept or reject) are constitutional; mandatory presumptions (one the jury is required to accept unless it is rebutted) are not constitutional. A permissive presumption in a jury charge is constitutional because it allows, but does not require, the jury to infer the ultimate facts from the predicate fact or facts. *Garrett v. State*, 220 S.W.3d 926, 930 (Tex. Crim. App. 2007); *Willis v. State*, 790 S.W.2d 307, 310 (Tex. Crim. App. 1990). A mandatory presumption in a jury charge is unconstitutional because it relieves the State of its burden of proving every element of the charged offense beyond a reasonable doubt and shifts the burden to disprove the presumption to the accused.[7]

[7] *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) "[A] conclusive presumption ... conflict[s] with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime and invade[s] the factfinding function which in a criminal case the law assigns solely to the jury.") (quotation marks omitted) (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952)); *Ulster Cnty Ct. v. Allen*, 442 U.S. 140, 156 (1979) ("[I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."); *Francis v. Franklin*, 471 U.S. 307, 316 (1985) ("The challenged sentences are cast in the language of command. They instruct

Whether a presumption contained within a jury charge is mandatory or presumptive depends, of course, on the language of the jury charge. For example, the wording of a mandatory presumption could be converted into a permissive presumption by rephrasing of the language or definitions contained in the jury charge. *Garrett*, 220 S.W.3d at 930-931. In the context of a speeding case, for example, the Court of Criminal Appeals was once confronted with a jury charge that did not define the term "*prima facie*" and reversed because of that. *Thomas v. State*, 474 S.W.2d 692, 695 (Tex. Crim. App. 1972)

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the jury that acts of a person of sound mind and discretion *are presumed* to be the product of the person's will, and that the person *is presumed* to intend the natural and probable consequences of his acts[.] ... The jurors were not told that they had a choice, or that they *might* infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory. The portion of the jury charge challenged in this case directs the jury to presume an essential element of the offense—intent to kill—upon proof of other elements of the offense—the act of slaying another. In this way the instructions undermine the fact finder's responsibility at trial, based on evidence adduced by the State, to *find* the ultimate facts beyond a reasonable doubt.") (citations and quotation marks omitted; emphasis in original); *Garrett v. State*, 220 S.W.3d 926, 930 (Tex. Crim. App. 2007) ("Mandatory presumptions are unconstitutional because they relieve the State of proving every element of the offense beyond a reasonable doubt."); *Guzman v. State*, 168 S.W. 185, 193 n.17 (Tex. Crim. App. 2006) ("All presumptions in criminal cases must be permissive: mandatory presumptions are unconstitutional in criminal cases." Thus, while a jury may infer that evidence beyond a reasonable doubt that a defendant point a gun at another person sufficiently proves recklessness, it is not required that a jury do so.") (citations omitted); *Brown v. State*, 122 S.W.3d 794, 799 (Tex. Crim. App. 2003) ("Mandatory presumptions violate due process by shifting the burden of proof to a criminal defendant on a central fact or element of the offense.").

("We hold that the failure to define the term '*prima facie* evidence' is reversible error."). In reaching this conclusion, the court said:

> When the State in a criminal case introduces evidence that an accused was driving in excess of seventy miles an hour on a Federal Highway in a rural area, it has placed the issue before the jury to determine together with all other testimony and in connection with the presumption that the accused is innocent until proven guilty beyond a reasonable doubt whether this establishes to their satisfaction that the accused was driving at a speed greater than was reasonable and prudent under the conditions then existing. The State has introduced some evidence, if it is believed, that the accused was driving at a speed greater than was reasonable and prudent. No particular weight is assigned prima facie evidence by law except that the jury *may* find a verdict based upon it.

Id. (emphasis in original). The instruction in this case was a mandatory presumption because it told the jury that Appellant, by driving above the posted speed limit was guilty as charged, even though the elements of speeding required proof, not that Appellant drove above the posted speed, but that he drove "at a speed greater than is reasonable and prudent under the circumstances then existing."

The fact that the instruction tracts the language of section 545.352(a) does not overcome the due process problem because, or course, constitutional mandates are supreme to state statutory

mandates. U.S. CONST. VI, cl. 2. Moreover, section 545.352(a) does not require the trial court to include this language within the charge. Rather, it reflects the legislative intent to effectuate the general statutory scheme of presetting speed limits that can be altered by the Transportation Commission or municipalities with posted signs within the context of the prohibited conduct of driving at speeds greater than are reasonable and prudent under the circumstances then existing. Obviously a pre-set or posted speed is a relevant evidentiary circumstance in the trial of a speeding case. It is not, however, the dispositive fact that is the elemental basis of an offense according to the statute as written by the legislature. The jury charge complained of erroneously tells the jury it is, unless Appellant proves otherwise. In short, the charge violates Appellant's right to have the State prove the elements of the speeding charge beyond a reasonable doubt without shifting the burden to Appellant.

When, as here, the jury charge misdefines the State's burden of proof as being less than beyond a reasonable doubt, the appellate remedy, without further analysis, is a reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993); *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam); *see also Sandstrom*, 442 U.S. at 526 (stating

that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside).

PRAYER

Appellant, Ted Dahl, prays that the Court reverse for a new trial.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the number of words contained in this document are 4,606 according to the computer program used to prepare this document.

Dated: February 20, 2020

/s/Timothy A. Hootman_____
Timothy A. Hootman

CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing document upon the following attorneys by electronic service:

Jeri Yenne
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Dated: February 20, 2020

/s/Timothy A. Hootman_____
Timothy A. Hootman