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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of General Sessions

Brian M. Gibbons, Circuit Court Judge

Opinion No. 2016-UP-448 (S.C. Ct. App. filed November 2, 2016)

Appellate Case No. 2016-002547

THE STATE, ...Respondent,

v.

COREY JAMAL WILLIAMS,.....Petitioner.

BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals properly reverse the plea judge's sentence of home detention and remand for resentencing when the plea judge erred in interpreting the Home Detention Act, sections 24-13-1510 to -1590, to allow home detention for a violent offense when the plain language of the statute states it only applies to nonviolent offenders?

STATEMENT OF THE CASE

A York County Grand Jury indicted Corey Jamal Williams (Petitioner) for trafficking in marijuana, ten to one hundred pounds, first offense, pursuant to section 44-53-370(e)(1)(a)(1) of the South Carolina Code. On August 28, 2014, Petitioner pled guilty before the Honorable Brian Gibbons. Todd Rutherford, Esquire, represented Petitioner, and Assistant Solicitor Matthew Shelton, Esquire, represented Respondent (the State). Judge Gibbons accepted Petitioner's guilty plea and sentenced him to ten years' imprisonment "provided upon the service of one year of house arrest," the balance is suspended upon two years' probation, the first year of which consists of house arrest with electronic monitoring.

On September 2, 2014, the State filed a Notice of Appeal and subsequently filed a Brief of Appellant. On August 5, 2015, Petitioner filed a Motion to Dismiss Appeal as Moot, which the Court of Appeals denied. On September 9, 2016, the Court of Appeals heard oral arguments, and on November 2, 2016, it reversed Petitioner's sentence and remanded the case for resentencing in an unpublished opinion. *State v. Corey Jamal Williams*, Op. No. 2016-UP-484 (S.C. Ct. App. filed Nov. 2, 2016) (App.p.1-p.3). Petitioner filed a petition for rehearing, to which the State filed a return requesting the petition be denied but the opinion be published. (App.p.4-p.12). The Court of Appeals denied both the petition for rehearing and the request to publish. (App.p.14). On January 18, 2017, Petitioner submitted a Petition for Writ of Certiorari to the Court of Appeals. On February 21, 2017, the State submitted a Return to Petition for Writ of Certiorari, and by Order dated September 8, 2017, this Court granted the petition and directed the parties to serve and file the appendix and briefs as provided by Rule 242(i), SCACR. On October 9, 2017, Petitioner filed his Brief of Petitioner. This Brief of Respondent now follows.

STATEMENT OF FACTS

The following facts were recited by the State and agreed to by Petitioner at his plea hearing. On Friday, August 2, 2013, officers from the York County multi-jurisdictional drug unit observed Petitioner driving his vehicle in and out of parking lots in a suspicious manner. After Petitioner parked, the officers approached and knocked on the window of the vehicle. When he opened the door, the officers smelled a strong odor of marijuana. The officers observed that Petitioner was very nervous and sweating heavily. Based on the smell of marijuana and his nervous behavior, the officers detained Petitioner. They saw a large box in plain view in the cargo area of the vehicle. A K-9 drug dog that was in the vicinity alerted to the presence of drugs inside the box. The officers could also smell marijuana coming from the area. (R.p.8, lines 2-25).

Officers found over ten pounds of marijuana inside the box. Petitioner told officers he planned to make money off the drugs in the box. At the time of arrest, he had over $600 on his person. Officers found pictures of a large box of marijuana on Petitioner's cell phone. Additionally, officers found pictures of other bags of marijuana and pictures of large amounts of cash in a brief case, as well as multiple phones. (R.p.9, lines 1-20).

At the plea proceeding, the court conducted a standard colloquy establishing Petitioner was freely, intelligently, and voluntarily pleading guilty to trafficking in marijuana, ten to one hundred pounds, first offense, pursuant to section 44-53-370(e)(1)(a)(1). (R.p.5, line 17-p.7, lines 13; R.p.41-p.42). Petitioner acknowledged the minimum sentence was one year. (R.p.6, lines 3-5). Petitioner agreed with the recitation of facts given by the State, and the plea court accepted his plea. (R.p.10, lines 18-23). Defense counsel then requested Petitioner be sentenced to ten years' imprisonment suspended to one year of house arrest. (R.p.12, lines 2-21). He

explained to the plea judge that other counties had used the "Home Incarceration Program" (HIP) in imposing sentences for trafficking.[1] (R.p.13, lines 5-19). The State responded by arguing that the HIP statute, section 24-13-1530, specifically applies only to nonviolent and juvenile offenders. (R.p.14, lines 5-7). The State pointed out that trafficking is a violent crime as defined by statute under section 16-1-60. (R.p.14, lines 7-9). The solicitor argued:

> Considering that on [its] face coupled with the fact that [Petitioner] has a prior weapon conviction, a felony weapon conviction, also the fact that most of our recent murders have involved drugs, and there is a known nexus between drugs and violence, this is clearly a – something that is not envisioned by the sentence as far as – by the statute as far as the Solicitor's office is concerned.

(R.p.14, lines 9-16). The plea court ruled:

> I will just say from a practical standpoint this Court along with numerous other Circuit judges-I can't state all their names-has interpreted the Home Detention or the Home Incarceration Program, whatever you want to call it it[']s referred to [as] HIP in other counties to allow the Court leeway to sentence a situation such as this to house arrest.
>
> Now I can't cite the specific reasoning for that. I just know I've done it, I know many other judges who have done it, it's regularly done in Greenville, Pickens or that[] the Thirteenth Circuit has regularly done it. The Fifth Circuit has regularly done it, the Seventh Circuit. It will be unless I am instructed otherwise regularly done in the Sixth Circuit. And so I know you all's policy here in the Sixteenth Circuit is not to do it and that's fine.
>
> But of course I'm the judge, I'm the one who passes the sentence not the solicitor's office but I certainly think it[']s appropriate in this case to enact and order a sentence such as your lawyer has suggested . . . . So while I certainly understand the State's position as to the Court's ability to do this, I'm gonna fashion this sentence this way.

[1] S.C. Code Ann. § 24-13-1530 (2007). While the imposition of home detention under section 24-13-1530 is called HIP in certain local jurisdictions, the statute uses the term "home detention" rather than "home incarceration" or "house arrest."

(R.p.15, line 18-p.17, line 1). The plea judge sentenced Petitioner as follows: "[Y]ou're on probation for two years. So the first year of your probation you're on house arrest with electronic monitoring. The second year of your probation you're just on probation." (R.p.17, lines 5-8). The State then argued:

> It[']s come to my attention that-I'm not familiar with the other circuits, but it's come to my attention that there were specific administrative orders in place in these other circuits that account for these possible sentences under the HIP Program and that the Probation Pardon and Parole Officer[]s there are equipped to deal within their normal course. We do not have such an administrative order in the Sixteenth Circuit. I'm not aware of whether or not our probation office is capable of enforcing this and that is certainly a factor that is outlined in the statute that I cited earlier.
>
> You know part of why we were discussing it earlier you know it's not just a matter of policy, there is no administrative order in place that creates a mechanism for this-for a court sentence to be carried out.

(R.p.17, line 20-p.18, line 9).

At that point, the State asked the plea judge to reconsider Petitioner's sentence. (R.p.18, lines 12-15). The courtroom representative from the S.C. Department of Probation, Parole and Pardon Services (the Department) told the court she had not dealt with this issue much but her understanding, based on a case she handled years ago in Greenville, was that the Department did not get involved until after the person finished house arrest and began probation. (R.p.19, lines 12-20). Defense counsel explained the parameters of the house arrest and indicated that Ned Polk, a private operator, would monitor the house arrest and report any violation to the Solicitor. (R.p.12, lines 21-23; p.19, line 21-p.20, line 8). The plea judge then stated that he had written on the sentencing sheet that any violation during the year of house arrest would be reported to the

Department.[2] (R. 20, lines 9-14). After the State requested the plea judge issue an order requiring the monitoring company to have certain parameters, the plea judge requested defense counsel prepare such an order and indicated he would sign it.[3] (R.p.21, lines 4-22).

[2] Because the HIP contemplates using home detention as "an alternative to incarceration" but does not actually place the person on probation, the Department would have no jurisdiction to monitor or enforce the terms of the HIP.

[3] It appears no order setting the terms and conditions of the private HIP was ever prepared by counsel despite the request.

ARGUMENT

The Court of Appeals properly reversed the plea judge's sentence of home detention and remanded for resentencing because the plea judge erred in interpreting the home detention statute, sections 24-13-1510 to -1590, to allow home detention for a violent offense when the plain language of the statute states it only applies to nonviolent offenders.

On appeal to the Court of Appeals, the State argued the plea court erred in suspending Petitioner's ten-year sentence to one year of house arrest and one year of probation based on section 24-13-1530 of the South Carolina Code. The statute provides: "Notwithstanding another provision of law which requires mandatory incarceration, electronic and nonelectronic home detention programs may be used as an alternative to incarceration for **low risk, nonviolent adult and juvenile offenders** as selected by the court if there is a home detention program available in the jurisdiction." S.C. Code Ann. § 24-13-1530(A) (2007) (emphasis added). Because trafficking is a violent crime, as defined in section 16-1-60, the State argued the plea judge erred in sentencing Petitioner to house arrest for this crime. The Court of Appeals agreed and reversed and remanded the case for resentencing.

Section 44-53-370(c)(1)(a)(1)

Oddly, Petitioner argues the Court of Appeals ignored a concession from the State when it found the State's argument on appeal was preserved. (Brief of Petitioner, p.5). However, a close look at the Court's opinion shows the Court found "[t]he State concedes that its argument regarding section 44-53-370(c)(1)(a)(1) was not raised before the plea court and, thus, is not preserved for our review. . . . However, we find the State's objection to the applicability of the home detention statute to Williams' conviction for trafficking in marijuana was sufficiently specific to preserve the issue of sentencing for this court's review." (App.p.2) (emphasis added). It appears what Petitioner frames as a concession of the entire issue actually only pertained to a

small subsection of the argument, which was neither raised to nor ruled upon by the plea court. Notably, although not preserved, the plea judge's act of suspending all or any part of Petitioner's ten-year sentence was **clearly improper**. *See State v. Jacobs*, 393 S.C. 584, 713 S.E.2d 621 (2011) (finding that numerous penal statutes include explicit language prohibiting suspension of sentences); *State v. Thomas*, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007) (declining to extend the general power to suspend sentences derived from S.C. Code Ann. § 24-21-410 to offenses where the legislature specifically mandated that no part of a sentence may be suspended); S.C. Code Ann. § 44-53-370(e)(1)(a)(1) (2002 & Supp. 2013) (emphasis added) (providing that anyone convicted of trafficking in marijuana between ten pounds and a hundred pounds must be punished "for a first offense, [to] a term of imprisonment of not less than one year nor more than ten years, **no part of which may be suspended nor probation granted**, and a fine of ten thousand dollars").

Section 24-13-1590(1)

In regard to the Home Detention Act itself, Petitioner first contends section 24-13-1590(1) specifically allows a sentence of home detention for his offense—trafficking in marijuana, ten to one hundred pounds. (Brief of Petitioner, p.5-p.7). He laments that "The Court of Appeals did not even cite the statute that controls the decision in this case" and relies on the cannon of statutory construction that the exclusion of some items implies the inclusion of items not excluded. He argues: "The Court of Appeals' failure to grapple with this basic canon of statutory construction is a fatal error" which warrants reversal. (Brief of Petitioner, p.3).

However, Petitioner misconstrues the referenced portion of the statute as one of inclusion rather than exclusion. That portion of the statute actually refers to additional crimes— beyond those that are violent—that are **also** excluded from the use of home detention. Indeed, there are

certain crimes classified as "nonviolent" crimes,[4] such as possession with intent to distribute cocaine third offense,[5] a "Class A" felony,[6] which are excluded by section 24-13-1590(1) **in addition to** the "violent" crimes excluded by section 24-13-1530(A). It does not mean as Petitioner claims that the Act applies to his crime simply because it is not listed in section 24-13-1590(1). Indeed, section 24-13-1590(1) does not list most violent crimes, including murder, criminal sexual conduct with minors, and homicide by child abuse. Under Petitioner's logic, all of these violent crimes should also be eligible for home detention in the judge's discretion. Such a result is absurd. The State does not dispute Petitioner's contention that "the first part of Section 1590(1) does not exclude petitioner's offense from the HDA." However, Section 24-13-1530 does, along with all other violent offenses defined by our Legislature in Section 16-1-60.

In support of his argument, Petitioner relies upon this Court's opinion in *State v. Burton*, 301 S.C. 305, 391 S.E.2d 583 (1990). While *Burton* certainly stands for the cannon of statutory construction cited by Appellant in his brief, it offers nothing in support of his argument in regard to the Act itself. Indeed, in *Burton* this Court refused to find that the specific mandatory minimum sentence provided by the crack statute would prevail over the general provisions of the Youthful Offender Act (YOA), and consequently held a youthful offender convicted of possession with intent to distribute crack cocaine is not precluded from receiving a sentence under the YOA. Here, by comparison, the State is not advocating the position that the trafficking statute should prevail over the provisions of the Act. Instead, it merely asks that each exclusionary provision of the Act be given effect under its plain and ordinary meaning. *See State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("All rules of statutory construction are

[4] S.C. Code Ann. § 16-1-70 (2015).

[5] S.C. Code Ann. § 44-53-370(b)(1) (2002 & Supp. 2015).

[6] S.C. Code Ann. § 16-1-90(A) (2015).

subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); *Binney v. State*, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009) (recognizing that in interpreting statutes, the court looks to the plain language of the statute); *State v. Gaines*, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008) (noting that if the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning); *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning and will not resort to forced construction that would limit or expand the statute."). Petitioner invites this Court to completely disregard one specific exclusionary provision of the Act in applying another specific exclusionary provision in the same Act. The State respectfully requests that, as was done by the Court of Appeals, the invitation be declined.

Limits of Discretion under Section 24-13-1530(A)

Petitioner next argues the language of the statute shows that the Legislature intended to allow judges to decide whether an offender is violent. Before the Court of Appeals he argued the sentencing judge has this discretion because the words "as selected by the court," follow the words "low risk, nonviolent adult and juvenile offenders." Yet, rather than "as selected by the court" indicating the trial judge has the discretion to determine whether the offender is low risk and nonviolent, the State submits a plain reading of the statute shows the "home detention programs" themselves are what are "selected by the court." This is indicated by the further language "if there is a home detention program available in the jurisdiction." Alternatively, "as selected by the court" would simply indicate the court has the discretion to impose home detention instead of incarceration, but only for otherwise qualified individuals who are not

specifically excluded. In other words, even if qualified, an offender would have no entitlement to home detention. Instead, he would only receive home detention "as selected by the court."

Before this Court, Petitioner first suggests the Legislature's use of the word "offenders" in section 24-13-1530 as opposed to the word "offenses" as used when listing violent crimes in section 16-1-60, suggests the two terms mean different things. (Brief of Petitioner, p.7-p.9). He identifies the Legislature's use of the phrases "violent crime" or "violent offense" in other statutory provisions and argues this demonstrates they similarly would have used the term "crime" or "offense" to describe the exclusion in section 24-13-1530 if that is what was intended. Yet, this suggestion is belied by several opinions issued by the appellate courts of this State. *See, e.g.*, *Jernigan v. State*, 340 S.C. 256, 260-61, 531 S.E.2d 507, 508 (2000) (using the phrase "violent offenders" to describe individual convicted of "violent crimes" as defined in section 16-1-60); *James v. South Carolina Dep't of Prob., Parole and Pardon Serv's*, 376 S.C. 392, 396 n.4, 656 S.E.2d 399, 402 n.4 (Ct. App. 2008) (citing section 24-21-620 of the Code as providing for parole review every twelve months for "nonviolent offenders" even though the actual language in the statute describes these individuals as being prisoners in confinement for "nonviolent crimes."). Thus, the use of the term "offenders" rather than "offenses" is of no moment.

Next, Petitioner suggests "[t]he use of the word 'may' indicates discretion vests with the sentencing judge." (Brief of Petitioner, p.8). However, that discretion lies in the court's decision as to whether to order home detention in lieu of incarceration for otherwise qualified individuals, not in any discretion to determine if an offender is violent. S.C. Code Ann. § 24-13-1530 (" . . . electronic and nonelectronic **home detention may be used as an alternative to incarceration**

for low risk, nonviolent adult and juvenile offenders may be used as an alternative to incarceration . . . .") (emphasis added).

Thus, nothing in the language of the statute gives discretion to a judge to determine whether an offender is violent or nonviolent. Our code of laws already addresses the types of crimes that are classified as violent and nonviolent. *See* S.C. Code Ann. § 16-1-60 to -70 (2003 & Supp. 2014). There is no need for a judge to have to determine whether an offender meets that definition when he or she must simply look at the list of offenses already provided in the statutes by the Legislature—the same Legislature that chose to limit home detention to nonviolent offenses.

In addition to the flaws in Petitioner's statutory logic, the facts also do not support his claim. Petitioner's argument that the judge "determined he had the discretion to impose a sentence of home detention" is not supported by the record. (Brief of Petitioner, p.4). Petitioner implies the plea judge based his determination on a careful consideration of whether he was violent by viewing Petitioner, hearing the facts of the crime, and hearing about Petitioner's work, family, and criminal history. On the contrary, the plea judge made no finding on the record regarding whether Petitioner was a "violent" offender. The only reason the plea judge gave for sentencing Petitioner to house arrest was because he knew other judges had done it in other counties and circuits.[7] Indeed, the plea judge readily admitted he could not "cite the specific reasoning for" his decision other than "other counties [] allow the Court leeway to sentence a situation such as this to house arrest." (R.p.15, line 25). Ultimately, he passed the sentence in the manner he did because "of course I'm the judge." (R.p.16, lines 8-11).

Finally, the State submits that even if Petitioner's argument that the term "violent **offense**" as used in § 16-1-60 is different from the way "nonviolent **offender**" is used in the HIP

[7] It is worth noting the judge in this case was a visiting judge from the Sixth Circuit.

statute is found to have any merit, the nature of the crime itself is certainly sufficient to demonstrate to the sentencing judge that Petitioner was NOT a low-risk, nonviolent offender by any stretch of that definition. As the State pointed out at the plea:

> Considering that on [its] face coupled with the fact that [Petitioner] has a prior weapon conviction, a felony weapon conviction, also the fact that most of our recent murders have involved drugs, and there is a known nexus between drugs and violence, this is clearly a – something that is not envisioned by the sentence as far as – by the statute as far as the Solicitor's office is concerned.

(R.p.14, lines 10-16) (emphasis added). Indeed, the prior weapon conviction involved a machine gun. (R.p.10, lines 14-17). Additionally, our appellate courts have recognized the "indisputable nexus between drugs and guns" and drugs and violence. *State v. Banda*, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006); *State v. Williams*, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008).

> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence.

Id. at 348, 669 S.E.2d at 646-47 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1002-03 (1991) (emphasis added)).

Issue is not Moot

Petitioner argues the Court of Appeals erred in finding this appeal is not moot. He contends the issue in this appeal is indeed moot because he has completed his term of imprisonment by way of home detention, and thus, has finished his sentence during the pendency of this appeal. Petitioner argues it would be manifestly unjust where he has served the entire sentence rendered by the trial judge to remand this case with language that could be used to

further imprison respondent. (Brief of Petitioner, p.9). The State disagrees and submits the Court of Appeals correctly found this issue is not moot because Petitioner has not yet completed his statutorily mandated term of incarceration. Further, a large number of criminal appeals would suddenly become moot if such a rule was applied, as many appeals involve short sentences that have been fully served before resolution.

As noted above, Petitioner was charged under Section 44-53-370(e), the trafficking statute, which specifically provides that anyone convicted of trafficking in marijuana between ten pounds and a hundred pounds, as Petitioner was, must be punished "for a first offense, [to] **a term of imprisonment of not less than one year** nor more than ten years, **no part of which may be suspended nor probation granted**, and a fine of ten thousand dollars." S.C. Code Ann. § 44-53-370(e)(1)(a)(1) (2002 & Supp. 2013). Therefore, Petitioner will not have completed his sentence of imprisonment until he has served at least one year of actual imprisonment. Black's Law Dictionary defines "imprison" as "1. To put into prison; to jail; incarcerate. 2. To keep (a person) somewhere so that the person is not at liberty, while preventing any departure." Black's Law Dictionary 875 (10th ed. 2014). Petitioner has neither been incarcerated in a prison or jail nor been prevented from departure while under house arrest. Therefore, he has not been imprisoned and has not served his mandatory one year of imprisonment as required by the statute under which he was charged.

Furthermore, even if this issue were moot as to Petitioner, it is capable of repetition and evading review. Judges around the state have been sentencing offenders, many of them for the offense of trafficking, to home detention for offenses that are statutorily categorized as violent. This Court needs to settle the legal rights afforded by S.C. Code Ann. § 24-13-1530(A), which is a significant issue of statutory construction and a matter of great public interest.

For all of the reasons set forth above, the plea court abused its discretion in finding home detention was an appropriate sentence for the crime of trafficking pursuant to section 24-13-1530(A) because Petitioner simply could not be classified as a "low-risk, nonviolent offender." Moreover, the plea judge made no findings on the record indicating he made a determination that Petitioner was not violent. Based on Petitioner's record and the known nexus between drugs and violence, he was not nonviolent. Additionally, this issue is not moot. The Court of Appeals properly reversed and remanded for resentencing within the confines of the statute. Its decision should be affirmed. Also, the State requests that in addition to affirming the decision of the Court of Appeals, this Court publish its opinion to establish precedent and provide guidance to the bench and bar on this matter of great public interest.

CONCLUSION

The State respectfully requests that this Court affirm the Court of Appeals' opinion remanding for resentencing by publishing its own opinion which provides guidance to the bench and bar on this significant issue.

Respectfully submitted,

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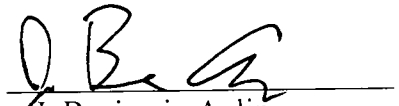
BY: 
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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
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THE STATE, ...Respondent,

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COREY JAMAL WILLIAMS,.....Petitioner.

PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Brief of Respondent*, dated November 8, 2017, on Petitioner by depositing two copies of the Petition in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 8th day of November, 2017.

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