IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO.: 05-2006-CF-014592-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

v.

JAMES PHILLIP BARNES,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS ALL PENDING POSTCONVICTION PROCEEDINGS AND APPELLATE REVIEW

THIS CAUSE came before the Court on the Supreme Court of Florida's Order entered on June 22, 2023, and filed herein on the same date. The Governor of the State of Florida issued on June 22, 2023, an active death warrant for the Defendant, and the Defendant's execution is scheduled for August 3, 2023. On June 22, 2023, the Supreme Court of Florida directed that "[t]he proceedings pending in the trial court, if any, shall be completed and orders entered as expeditiously as possible, but no later than 5:00 p.m. on Monday, July 3, 2023." This Court entered an Amended Scheduling Order, and held a case management conference which began at 2:00 P.M. on Tuesday, June 27, 2023.

At the case management conference, Attorneys Doris Meacham and Patrick Bobeck appeared on behalf of the Attorney General's Office and Assistant State Attorney Sue Garrett represented the State of Florida. Capital Collateral Regional Counsel Ali Shakoor, Adrienne Joy Shepherd, and Eric Pinkard represented the Defendant. At the case management conference, the defense moved *ore tenus* to dismiss all pending postconviction proceedings, and appellate review, in the above-styled case pursuant to Rule 3.851(i), Florida Rules of Criminal Procedure. Based on consideration of the defense's *ore tenus* motion, the Court makes the following findings of fact and conclusions of law:

Procedural Posture

a. On December 13, 2007, the Defendant was sentenced to death for the first-degree premeditated murder of [redacted] a nurse that the Defendant killed in her condominium in Melbourne, Florida, on April 20, 1988. Barnes v. State, 29 So. 3d 1010, 1013 (Fla. 2010). The Defendant was charged with murdering [redacted] after he wrote several letters to an assistant state attorney in 2005 and confessed in a recorded interview, which the Defendant arranged and in which he was questioned by another inmate about [redacted] murder. Id. DNA testing in 1997 linked the Defendant to crimes against [redacted] Id. However, it was not until April 18, 2006, when the Defendant was indicted for the first-degree murder of [redacted] as well as the burglary of a

dwelling with an assault or battery, sexual battery by use or threat of a deadly weapon (vaginal sexual battery), sexual battery by use or threat of a deadly weapon (anal sexual battery), and arson of a dwelling. Id. At the time the indictment was issued for [redacted] murder, the Defendant was already serving a life sentence for the first-degree murder of his wife, Linda Barnes, which occurred in 1997. Id.

b. The Defendant represented himself pro se throughout the guilt and penalty phases in this case in which he was charged with [redacted] murder. The Honorable Judge Lisa Davidson presided over the guilt and penalty phases in this case. Judge Davidson appointed the Office of the Public Defender as standby counsel. Assistant Public Defender Phyllis Riewe served as standby counsel for the Defendant during the guilt phase and Assistant Public Defender Randy Moore served as standby counsel for the Defendant during the penalty phase.

c. On May 2, 2006, the Defendant entered an "open" plea of guilty to the charged crimes of first-degree premeditated murder (Count I), burglary of a dwelling with an assault or battery (Count II), two counts of sexual battery by use or threat of a deadly weapon on a person older than twelve years of age (Counts III and IV), and arson of a dwelling (Count V). (See Exhibit "A," 5/2/2006 Transcript.)

d. On May 2, 2006, the Defendant waived his right to a jury recommendation and requested that the Court proceed to sentencing without the benefit of the jury's recommendation as to the imposition of life or death on Count I – First Degree Premeditated Murder. Judge Davidson found that the Defendant knowingly, freely, and voluntarily chose to forego a jury for the penalty phase. The Defendant explained that he was making a strategic decision to have a judge alone determine his sentence. (See Exhibit "A," pgs. 45, 53).

e. The Defendant represented himself pro se at the sentencing hearing and specifically chose not to present mitigating evidence or argument at the penalty phase, other than the fact that he came forward and took responsibility for the murder. Barnes v. State, 29 So. 3d 1010, 1014 (Fla. 2010).

f. On January 22-26, 2007, the State presented its evidence as to sentencing the Defendant on Count I, first-degree premeditated murder. Barnes v. State, 29 So. 3d 1010, 1014 (Fla. 2010).

g. On May 11, 2006, Judge Davidson ordered that a comprehensive pre-sentence investigation (PSI) be conducted, and on February 7, 2007, Judge Davidson appointed Attorney Sam Baxter Bardwell as special mitigation counsel to investigate and present any other mitigation evidence because the Defendant refused to present any mitigating evidence on his behalf other than that evidence already placed on the record. Barnes v. State, 29 So. 3d 1010, 1014 (Fla. 2010).

h. On November 16, 2007, the Court held a hearing at which Attorney Bardwell presented alleged mitigating evidence to the Court. Barnes v. State, 29 So. 3d 1010, 1014 (Fla. 2010).

i. On December 13, 2007, the Court sentenced the Defendant to death for [redacted] murder, finding that the six aggravating factors[1] outweighed the one statutory mitigator[2] and nine nonstatutory mitigators[3]. (See Exhibit "B," Judgment and Sentence.)

j. On direct appeal, the Defendant raised two issues – whether the trial court violated his Sixth Amendment right to represent himself when it appointed special court counsel to develop penalty-phase mitigation and whether the court reversibly erred in considering a presentence investigation report over the Defendant's objection that it contravened his constitutional right to confront witnesses against him. Barnes v. State, 29 So. 3d 1010, 1014 (Fla. 2010). In addition, the Supreme Court of Florida reviewed the knowing, intelligent, and

[1] The court found the following aggravators: (1) the murder was committed by one under sentence of imprisonment (great weight); (2) Barnes was previously convicted of another capital felony or felony involving use or threat of violence (murder of his wife in 1997) (great weight); (3) the murder was committed while Barnes was engaged in commission of a sexual battery and burglary (great weight); (4) the murder was committed for the purpose of avoiding or preventing a lawful arrest (great weight); (5) the murder was especially heinous, atrocious or cruel (great weight); and (6) the murder was cold, calculated and premeditated (great weight). Barnes v. State, 29 So. 3d 1010, n. 3 (Fla. 2010).

[2] The court found one statutory mitigator: Barnes was under the influence of extreme mental or emotional disturbance (slight weight). Barnes v. State, 29 So. 3d 1010, n. 4 (Fla. 2010).

[3] The nonstatutory mitigators were: (1) Barnes came forward and revealed his involvement in the unsolved crime (little weight); (2) he took responsibility for his acts (little weight); (3) he was under the influence of a mental or emotional disturbance (duplicating statutory mitigator and given little weight); (4) he has experienced prolonged drug use (little weight); (5) he did not have the benefit of a loving relationship with his mother (little weight); (6) he did not have the benefit of a loving relationship with his father (little weight); (7) he was sexually abused as a child (slight weight); (8) he has taken steps to improve himself (little weight); and (9) he is a functional and capable person and has demonstrated by his action and participation in this case that he sufficient intelligence and capabilities to contribute to society (little weight). Barnes v. State, 29 So. 3d 1010, n. 5 (Fla. 2010)

voluntary nature of the Defendant's plea to determine whether the death sentence was proportionate. Id.

k. On February 4, 2010, the Supreme Court of Florida issued a Mandate effectuating a decision affirming the Defendant's conviction for the first-degree murder of [redacted] as well as his other convictions in this case, and affirmed his sentence of death. Barnes v. State, 29 So. 3d 1010, 1030 (Fla. 2010). (See Exhibit "C," Mandate/Opinion). On October 4, 2010, the United States Supreme Court denied the Defendant's petition for writ of certiorari. Barnes v. Florida, 562 U.S. 901 (2010).

l. On September 21, 2011, the Defendant filed a motion for post-conviction relief. The motion was not signed under oath by the Defendant. (See Exhibit "D," rule 3.851 motion). However, collateral counsel filed a Motion for Competency Evaluation concurrent with the Rule 3.851 motion on September 21, 2011. Pursuant to Rule 3.851(g)(2), the Rule 3.851 motion was accepted as filed.

Competency evaluations were performed by Dr. Howard Bernstein and Dr. Jeffrey Danziger and reports dated October 26-27, 2011, were submitted to the Court on November 4, 2011. In the competency evaluations, Dr. Bernstein and Dr. Danziger both separately concluded after examining the Defendant that he has signs and symptoms of personality disorder, mixed type, with borderline,

antisocial, and sociopathic features, but this would not prevent him from comprehending the legal process and did not affect his competency. Dr. Bernstein wrote that the Defendant's behavior was a product of reasoned choices, and Defendant's voluntary failure to cooperate with counsel was not a product of disorganized psychotic thinking, but rather rational decision making. Dr. Danziger wrote that "Mr. Barnes presented as an individual of above average intelligence with a very good level of vocabulary, grammar, and diction." Dr. Danziger opined that "Mr. Barnes is intelligent and well aware of his legal situation." Both doctors found the Defendant competent. (See Exhibit "E," sealed competency evaluation reports attached to original January 23, 2012 Order Denying Motion for Postconviction Relief issued by Judge Griesbaum).

On November 4, 2011, the parties stipulated that the Defendant was competent. The Defendant thereafter did not amend the subject motion for postconviction relief. (See Exhibit "F").

m. In his first motion for postconviction relief, the Defendant raised two overall claims for postconviction relief: (1) ineffective assistance of standby counsel to move for a determination of Defendant's competence to proceed at the guilt and penalty phases and trial court error in not conducting a hearing *sua sponte* to determine the Defendant's competence to proceed; and (2) Defendant may be incompetent at the time of execution. As to the first overall claim, the

postconviction relief that the Defendant sought was withdrawal of his plea. (See Exhibit "D," Defendant's 9/21/2011 3.851 Motion).

n. The Honorable John M. Griesbaum presided over the first Rule 3.851 proceedings in the above-styled case. On January 23, 2012, Judge Griesbaum denied the Defendant's Rule 3.851 motion for postconviction relief. (See Exhibit "G," Order Denying Defendant's Motion for Postconviction Relief.)

o. In denying the Defendant's Rule 3.851 motion, Judge Griesbaum detailed the following facts that are relevant to this Court's ruling on the subject *ore tenus* motion seeking dismissal of postconviction proceedings and finding the Defendant mentally competent for purposes of Rule 3.851(i). On May 2, 2006, Judge Davidson conducted an extensive *Faretta* inquiry prior to the Defendant entering his plea to the Court in this case. The Defendant had thirteen years of school, one year of college, was a certified law clerk through the Florida Department of Corrections, and had worked in the prison's law library. (See Exhibit "A," pgs. 12-14). The Defendant responded to the Court's questions regarding his medical history, explaining that in 1990 he had been Baker Acted, and he had been diagnosed with borderline personality disorder. (See Exhibit "A," pgs. 15-6). Judge Griesbaum also discussed in his Rule 3.851 order the fact that Judge Davidson specifically found that the Defendant was competent,

stating "In fact, you appear to be extremely competent." (See Exhibit "A," p. 27, lines 13-14). Judge Davidson continued:

> Your demeanor, the way you've addressed the Court, the way you – I mean, not only what you've said but your presentation convinces me that you are competent, you understand what is happening here today, that you have knowingly, freely, and voluntarily exercised your discretion to represent yourself, that you are waiving the right to counsel for no other reason other than the fact that you want to represent yourself and that you – you know, this is a knowing and intelligent waiver and that you have the capacity to make that knowing and intelligent waiver and that you understand the advantages and disadvantages of representing yourself.

(See Exhibits "A," pgs. 27-8 and "G"). The Defendant told Judge Davidson under oath that he understood that by representing himself he was waiving any 3.850 or other collateral relief, because he could not later claim that he was ineffective. (See Exhibit "A," pgs. 28-9).

During the plea colloquy that immediately followed the *Faretta* inquiry, the Defendant supplemented the State's factual basis for the plea stating:

> On April 20, 1988 I broke into [redacted] condominium on [redacted] I raped her twice. I tried to strangle her to death. I hit her head with a hammer and killed her and I set her bed on fire.

(See Exhibit "A," pgs. 35-6). The Defendant informed the Court, "I'm adamant in entering these pleas and the Court accepting them." (See Exhibit "A," p. 41, lines 24-5). In accepting the Defendant's guilty pleas in this case, the Court found,

"You're alert, competent, and intelligent. And I don't know that the record's going to reflect how definitive your speech is unless someone pulls up the video. But you've been very definite today. You've been extremely alert." (See Exhibit "A," p. 43, lines 10-15).

The Supreme Court of Florida reviewed the guilty plea and held:

> Knowing, Intelligent and Voluntary Nature of the Plea
>
> Barnes does not challenge his conviction for first-degree murder in this appeal, nor does he challenge the acceptance of his guilty plea. Nevertheless, this Court has a mandatory obligation to review the basis of Barnes' conviction for first-degree murder. Where guilt is found after trial, the Court has a mandatory obligation to review the sufficiency of the evidence to support the conviction. *See Bevel v. State*, 983 So. 2d 505, 516 (Fla. 2008). FN10. In this case, Barnes was convicted after waiving his right to counsel and, after a *Faretta* hearing, was allowed to represent himself. He then entered an open plea of guilty to first-degree murder. Under these circumstances, "this Court's [mandatory] review shifts to the knowing, intelligent, and voluntary nature of that plea." *Tanzi v. State*, 964 So. 2d 106, 121 (Fla. 2007) (*quoting Winkles v. State*, 894 So. 2d 842, 847 (Fla. 2005)); *see also Guardado v. State*, 965 So. 2d 108, 118 (Fla. 2007); *Lynch v. State,* 841 So. 2d 362, 375 (Fla. 2003); *Ocha v. State*, 826 So. 2d 956, 965 (Fla. 2002). In such a review, this Court will "scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily." *Winkles*, 894 So. 2d at 847 (quoting *Ocha*, 826 So. 2d at 965).
>
> FN10. Florida Rule of Appellate Procedure 9.142(a)(6) expressly provides that "[i]n death penalty cases, whether or not insufficiency of the evidence or proportionality is an

issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief." *Id.*

In the present case, Barnes filed a written waiver of counsel on May 1, 2006. On May 2, 2006, the trial court conducted an extensive *Faretta* hearing during which the judge explained the indictment counts to Barnes and informed him of the maximum penalties for each, including the fact that the first-degree murder count carried the maximum penalty of death and that the State was seeking the death penalty. Barnes was advised of his right to have an attorney appointed to represent him if he could not afford one.

Barnes testified that he also understood he was facing a possible death sentence and that there were a number of defenses that might be available to him. He said that even so, he wanted to represent himself. Barnes explained:

> I'm invoking my Sixth Amendment right to assistance of counsel. I choose to defend myself.
>
> ....
> The United States Constitution has inalienable rights. And one of them is that I have the right to assistance of counsel. I would also like to make sure I have the right to represent myself.
>
> And that's the other side of the coin. I don't have many rights left in this world. That's one I have. So ...I wish to use that right.

Barnes explained that he understood the pitfalls of representing himself and confirmed that no promises or threats had been made in order to induce him to represent himself. The court found on the record that the requirements of Florida Rule of Criminal Procedure 3.111 had been met and that Barnes' request to represent

himself was made knowingly, freely, and voluntarily. FN11

> FN11. It should be noted that numerous *Faretta* inquiries were conducted throughout the case. Barnes continued to reject offers of counsel that were made at every critical stage in the proceedings, in compliance with the requirement, reiterated in *Muehleman v. State*, 3 So. 3d 1149 (Fla. 2009), as follows:
>
> > [W]here the right to counsel has been properly waived, the State may proceed with the stage at issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.
> >
> > *Id.* at 1156 (*quoting Traylor v. State,* 596 So. 2d 957, 968 (Fla. 1992)).

In this same May 2, 2006, hearing, Barnes was then allowed to proffer his open plea of guilty to the murder of [redacted] and to the other charged offenses. Prior to acceptance of the plea, the trial court allowed the State to present a factual basis for the plea, which the prosecutor did, stating essentially that [redacted] was killed by blunt-force trauma to the head, and was also strangled, in Brevard County, Florida, on April 20, 1988. Evidence showed she was sexually battered vaginally and anally and that she had sperm in her vagina, which DNA testing linked to Barnes. The prosecutor advised the court that the evidence would show Barnes entered [redacted] residence where he committed the sexual batteries, attempted to strangle her, and committed blunt force trauma on her, resulting in her death. He then set fire to the bedding and her body. The prosecutor advised the court that the evidence included a videotaped statement that Barnes made November 1, 2005, and the letter from Barnes to the prosecutor, in which Barnes detailed the

April 20, 1988, murder of [redacted] as well as the rapes, arson, and burglary. The court then asked Barnes to give his own factual basis for the plea, and advised him that anything he said could and would be used against him and that he had a Fifth Amendment right to remain silent. Barnes stated:

> On April 20, 1998, I broke into [redacted] condominium [redacted] I raped her twice. I tried to strangle her to death. I hit her in the head with a hammer and killed her and I set the bed on fire.

The trial judge determined that Barnes understood the nature of the charges, the mandatory minimum and maximum possible penalties, the right to appointed counsel, the right to be tried by a jury and compel attendance of witnesses, the right to confront and cross-examine witnesses, the right to testify or remain silent, the right to a direct appeal of all matters relating to the judgment, and the fact that if he answered any questions about the crime, the answers could be later used against him. Barnes was told that the possible sentences he could receive for the murder were life in prison or death. *See* Fla. R. Crim. P. 3.172(c)(1)-(6). Barnes clearly acknowledged his guilt, and also stated that he believed entry of the plea was in his best interest. *See* Fla. R. Crim. P. 3.172(e).

Based on the plea colloquy, the trial court found that Barnes was alert, competent, intelligent, and definite about wanting to enter a plea. The court also found that there was a factual basis for the plea to each of the counts and that Barnes made a knowing, intelligent waiver of his right to a jury trial and all the rights associated with it. Accordingly, the trial court accepted Barnes' guilty pleas and adjudged him guilty of the offenses, including first-degree murder. Thus, the plea colloquy fulfilled the requirements of Florida Rule of Criminal Procedure 3.172, which requires that "[b]efore

> accepting a plea of guilty or nolo contendere, the trial judge shall determine if the plea is voluntarily entered and that a factual basis for the plea exists." Fla. R. Crim. P. 3.172(a).
>
> We conclude that Barnes' plea in this case was knowing, intelligent, and voluntary, and that he "was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily." *Ocha*, 826 So. 2d at 965. Therefore, the plea and conviction were properly entered. Further, the factual basis for the plea given by the State, which was confirmed by Barnes and amply proven by the forensic evidence, as well as Barnes' confessions, demonstrates that there was competent, substantial evidence to support the conviction for first-degree murder, as well as the other convictions in this case.

Barnes v. State, 29 So. 3d 1010, 1020-1022 (Fla. 2010).

The postconviction trial court (Judge Griesbaum) found in summarily denying the first postconviction motion, that as to the alleged failure to *sua sponte* order a competency hearing, this issue had to be raised on direct appeal and therefore, was procedurally barred when raised for the first time in Defendant's motion for postconviction relief. Nelson v. State, 43 So. 3d 20 (Fla. 2010). The postconviction trial court, Judge Griesbaum, further found that the Defendant consulted with standby counsel and talked with court counsel. Judge Griesbaum found that no counsel, prosecutor, or judge had any doubt the Defendant was not competent as shown by the record. Judge Griesbaum also pointed out in his 3.851 postconviction that Judge Davidson found the Defendant

"extremely competent" to represent himself after learning from the Defendant that he had been Baker Acted in 1990, had been diagnosed with borderline personality disorder, and hearing Defendant's comments regarding mitigation evidence. Judge Davidson had the opportunity to observe the Defendant on several occasions and numerous *Faretta* inquiries were conducted throughout the case because the Defendant continued to reject offers of counsel. (See Exhibits "A" and "G"). In the discussion between Judge Davidson and the Defendant, Judge Davidson stated that an attorney would be "appointed for the Court" and the Defendant stated that it was the State Attorney's job to help the Court and he did not want an attorney appointed to "protect me or defend me, I don't need that. And I don't want that." (See Exhibit "A," p. 52, lines 9-11.)

p. On November 18, 2013, the Supreme Court of Florida issued a Mandate effectuating a decision per curiam affirming Judge Griesbaum's Order denying the Defendant's Rule 3.851 postconviction motion. (See Exhibit "H," 3.851 Mandate/Decision). Barnes v. State, 124 So. 3d 904 (Fla. 2013).

q. On April 25, 2018, the Middle District for Florida denied the Defendant's federal habeas corpus petition. Barnes v. Secretary, Department of Corrections, 2016 WL 472631 (M.D. Fla. Feb. 8, 2016).

r. On April 25, 2018, the Eleventh Circuit Court of Appeals issued an order affirming the denial of federal habeas corpus relief. Barnes v. Secretary,

Department of Corrections, 888 F. 3d 1148 (11th Cir. 2018), cert. denied, 139 S. Ct. 945 (2019).

Competency for Purposes of Rule 3.851(i)

s. The Court finds that the Defendant is competent for purposes of Rule 3.851(i). The record shows that the Defendant is not only competent, but also intelligent. The Court conducted an extensive colloquy with the Defendant on June 27, 2023, and carefully listened to his responses. The Defendant clearly understood why he was in the courtroom, what he was charged with, that an active death warrant had been issued for his execution, and that he was scheduled for execution on August 3, 2023. The Defendant was able to recite the applicable rules to his case. The Defendant understood the nature of the death penalty, why it was imposed, and is keenly aware that the State is executing him for [redacted] murder he committed, and he will physically die as a result of the execution. The Defendant was alert, understood the English language, and was not under the influence of anything that would impair his judgment or prevent him from thinking clearly. The Court finds that the Defendant does not have mental illnesses that would interfere with his rational understanding of the facts of his pending execution and the reason for it. Based on the undersigned judge's colloquy with the Defendant in this case, as well as the procedural posture set forth in detail above, and attachments to this Order,

the Court has no doubt of the Defendant's competence, and there is no reason for a competency evaluation as the Defendant is clearly competent for purposes of Rule 3.851(i).

Knowingly, Freely, and Voluntarily Dismissal of Pending Postconviction Proceedings and Appellate Review

t. The Court further finds that the Defendant knowingly, freely, and voluntarily dismissed all pending postconviction proceedings and appellate review in the above-styled case, pursuant to Rule 3.851(i). At the hearing on June 27, 2023, the Defendant was adamant that he did not want any postconviction proceedings to occur, that he wanted to accept responsibility for his actions, and proceed to execution (his death) without any delay. The Defendant specifically told the Court that he "did not want to delay justice" and he wanted "to see justice to be served in this case." Postconviction counsel, along with two defense private investigators were at the hearing on June 27, 2023, and represented that they were prepared and ready to file a postconviction motion on June 28, 2023, pursuant to this Court's case management plan. The Defendant indicated that even knowing this, he wanted to waive all pending postconviction proceedings, including appellate review. The Defendant refused to see the defense expert hired to evaluate him for any potential postconviction claims.

Accordingly, it is hereupon **ORDERED:**

1. The defense's *ore tenus* Motion for Dismissal of Postconviction Proceedings pursuant to Rule 3.851(i), Florida Rules of Criminal Procedure is **GRANTED.**

2. The Defendant knowingly, freely, and voluntarily waived appellate review of the dismissal of the postconviction proceedings.

3. For purposes of the record, the transcript from June 27, 2023, in which the Defendant dismissed all postconviction proceedings shall be filed in the above-styled case number.

4. For purposes of compliance with the Supreme Court of Florida's Order entered on June 22, 2023, this Order with attachments shall be transmitted to the Supreme Court of Florida.

5. The hearings set forth in the Trial Court's Amended Scheduling Order are hereby **CANCELLED.**

DONE AND ORDERED at the Moore Justice Center, Viera, Brevard County, Florida, this 28 day of JUNE 2023.

STEVE HENDERSON
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I do hereby certify that copies of this Order have been provided by e-mail and by U.S. Mail to:

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I do hereby certify that copies of this Order have been provided by e-mail and **(without exhibits)** by U.S. Mail to:

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