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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. TYRELL C. ERLEBACH, Defendant-Appellant.	Nos. 44468, 44469 & 44470 Payette County Case Nos. CR-2016-154, CR-2016-151 & CR-2016-155
STATE OF IDAHO, Plaintiff-Respondent, v. BRUCE ERLEBACH, Defendant-Appellant.	

JOINT BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF PAYETTE

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STATEMENT OF THE CASE

Nature Of The Case

Tyrell Erlebach and Bruce Erlebach appeal from the dismissal without prejudice of indictments against them. They assert such dismissals should have been with prejudice.

Statement Of The Facts And Course Of The Proceedings

Tyrell Erlebach came home in the wee hours of the morning highly intoxicated. (#44470 R., p. 13; G.J. Tr., p. 7, L. 4 – p. 8, L. 3; p. 17, L. 17 – p. 18, L. 8.) He took his clothes off, told his girlfriend K.B. (who was in bed with their son) he was going to show her "what his little penis was going to do to [her]," got on top of her, choked her and poked her in the eye. (#44470 R., p. 13; G.J. Tr., p. 8, L. 7 – p. 16, L. 19.) After several minutes of this he let K.B. up, and she went to the couch, but he followed her, still naked, and, as he "pulled [her] underwear to the side [he] told [her] that he was going to show [her] what his little penis was going to do" and also told her that if she did not get back to the bedroom he was going to "bury" her. (G.J. Tr., p. 16, L. 20 – p. 20, L. 16.) K.B. returned to the bedroom and was at some point able to get away from Tyrell, grabbed a pistol, and pointed it at Tyrell, telling him to stay away. (#44470 R., p. 13; G.J. Tr., p. 20, L. 23 – p. 23, L. 9.) Tyrell reacted by getting another gun and threatening both K.B. and their son with it. (#44470 R., p. 13; #44468 R., p. 17; G.J. Tr., p. 22, L. 15 – p. 24, L. 19.) K.B. then barricaded herself and the children in a bedroom for a time before fleeing the house to a neighbor's home. (#44470 R., p. 13; #44468 R., p. 17; G.J. Tr., p. 24, L. 20 – p. 26, L. 16; p. 27,

Ls. 16-19.) As she fled she heard two gunshots. (#44470 R., p. 13; #44468 R., p. 17; G.J. Tr., p. 26, L. 11 – p. 27, L. 12.)

K.B.'s father, Larry, arrived at the house before police officers. (#44470 R., p. 13; G.J. Tr., p. 45, L. 13 – p. 50, L. 11.) Tyrell attacked him and inflicted serious injuries on Larry, including breaking bones in his face. (#44470 R., pp. 13-14; #44468 R., p. 17; G.J. Tr., p. 50, L. 12 – p. 57, L. 12.)

When officers attempted to arrest Tyrell he resisted, striking two officers before officers deployed a Taser. (#44470 R., p. 14; G.J. Tr., p. 67, L. 17 – p. 72, L. 8; p. 88, L. 16 – p. 91, L. 12.) While officers were arresting Tyrell, his father, Bruce, arrived at the scene, punched one of the arresting officers in the face, and also had to be tazed to be taken into custody. (#44470 R., p. 14; G.J. Tr., p. 72, Ls. 9-24; p. 74, L. 19 – p. 75, L. 4; p. 91, L. 12 – p. 92, L. 19.)

The state filed complaints charging Tyrell with attempted rape, attempted strangulation, battery on a law enforcement officer, and aggravated battery (#44468 R., pp. 11-12), and Bruce with felony battery on a law enforcement officer and misdemeanor battery on a law enforcement officer (#44470 R., pp. 6-7). A grand jury later handed down indictments against Tyrell for attempted rape, attempted strangulation, felony domestic violence, injury to a child, two counts of intimidating a witness, aggravated battery, and two counts of battery on a law enforcement officer (#44468 R., pp. 43-46) and against Bruce for battery on a law enforcement officer (#44470 R., pp 34-35).

Tyrell and Bruce filed motions to dismiss the indictments and to suppress evidence. (#44468 R., pp. 170-71; #44468 Sealed R., pp. 1-83; #44470 Sealed

R., pp. 1-26) The bases for the motions to dismiss were claims that there were fewer than 12 impartial grand jurors, that false or inadmissible evidence was admitted, and that "defects" in the proceedings prejudiced the defendants. (#44468 Sealed R., p. 1; #44470 Sealed R., p. 17.) The state responded to these arguments. (#44470 R., pp. 113-16; #44468 Sealed R., pp. 84-109; #44468 R., pp. 271-73.)

The district court granted the motions to dismiss. (#44468 R., pp. 311-19; #44470 R., pp. 119-27.) Specifically, the district court found that one of the twelve grand jurors admitted bias[1] and that her statements that she would "'try'" to be impartial and "'think[s]'" she can be impartial were not an "unequivocal assurance" of impartiality. (#44468 R., pp. 314-16; #44470 R., pp. 122-24.) Because only eleven of the twelve grand jurors who returned the indictments were qualified, the indictments had to be dismissed. (#44468 R., p. 317; #44470 R., pp. 124-25.) Defendants moved for clarification whether the dismissals were with prejudice (#44468 R., pp. 321-29; #44470 R., pp. 129-35) and the district court entered orders of dismissal without prejudice, citing I.C.R. 48 (#44468 R., p. 330; #44470 R., p. 136). Tyrell and Bruce filed notices of appeal timely from the dismissal orders. (#44468 R., pp. 339-46; #44470 R., pp. 140-44.)

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[1] The grand juror worked with Larry Butler, one of Tyrell's victims, and she said that would negatively affect her view of the evidence. (#44468 R., pp. 314-15.)

ISSUES

The Erlebachs state the issues on appeal as:

A. (1) Does the district court have supervisory power to dismiss an indictment with prejudice for governmental misconduct? (2) Did the district court abuse its discretion in denying the request for dismissal with prejudice?

B. Did the district court err in failing to make requested findings of fact regarding the motions to dismiss with prejudice, particularly regarding the evidence showing prosecutorial misconduct and resultant prejudice?

C. Did the district court err in dismissing the indictment without prejudice as the evidence of prosecutorial misconduct at the Grand Jury and the resultant prejudice to the Erlebachs require a dismissal with prejudice?

(Appellants' brief, p. 10.)

The state rephrases the issue as:

Have the Erlebachs failed to demonstrate any abuse of discretion in the dismissal without prejudice?

ARGUMENT

The Erlebachs Have Failed To Demonstrate Any Abuse Of Discretion In The Dismissal Without Prejudice

A. Introduction

Tyrell and Bruce "challeng[ed] the impartiality" of three grand jurors. (#44468, R., p. 314; #44470 R., p. 122.) The district court concluded that one of the challenged grand jurors had admitted bias because she worked with Larry Butler, had heard rumors Larry had been beaten up, and was aware of a collection at work to assist Larry, and had admitted that this information would negatively affect her ability to evaluate the facts. (#44468, R., p. 314; #44470 R., p. 122.) This bias was not dispelled by the grand juror's statements she could be impartial because such statements were not "unequivocal." (#44468, R., pp. 314-16; #44470 R., pp. 122-24.) Because that left only eleven jurors who had voted to indict, the indictments had to be dismissed. (#44468, R., p. 317; #44470 R., pp. 124-25.) Application of the relevant legal standards shows that the district court properly dismissed without prejudice where the only error was that one of the grand jurors was not qualified because her assertions that she could be impartial were equivocal.

The Erlebachs assert the district court erred by not dismissing with prejudice, first arguing that the district court's citation to I.C.R. 48, allowing dismissal without prejudice, in its orders dismissing without prejudice, shows the district court abused its discretion. (Appellants' brief, pp. 10-15.) The argument that the district court's citation to a rule that specifically authorized the action it took shows an abuse of discretion is without merit.

The Erlebachs next argue that the district court erred by failing to make findings of fact. (Appellants' brief, pp. 15-16.) The record, however, shows the district court made the findings of fact it deemed relevant to its decision. The Erlebachs have failed to show error.

Finally, the Erlebachs argue the record demonstrates that the indictments should have been dismissed with prejudice. (Appellants' brief, pp. 16-40.) Review of this argument shows it to be without merit.

B. Standard Of Review

"The decision to grant or deny a motion to dismiss an indictment based on irregularities in grand jury proceedings is reviewed for an abuse of discretion." State v. Marsalis, 151 Idaho 872, 875, 264 P.3d 979, 982 (Ct. App. 2011) (citing State v. Bujanda–Velazquez, 129 Idaho 726, 728, 932 P.2d 354, 356 (1997)).

C. The Erlebachs Have Failed To Show Extreme Circumstances Where Dismissal Without Prejudice Is An Insufficient Remedy

The general standards for a motion to dismiss for irregularities in the grand jury proceedings are well established:

> Our inquiry into the propriety of the grand jury proceeding is two-fold. First, we must determine whether, independent of any inadmissible evidence, the grand jury received legally sufficient evidence to support a finding of probable cause. Second, even if such legally sufficient evidence were presented, the indictment must be dismissed if the prosecutorial misconduct in submitting illegal evidence was so egregious as to be prejudicial.

State v. Martinez, 125 Idaho 445, 448, 872 P.2d 708, 711 (1994). "To determine whether misconduct is so grievous as to be prejudicial and thus to require dismissal, an appellate court must balance the gravity and seriousness of the

misconduct against the extent of the evidence supporting the indictment." State v. Marsalis, 151 Idaho 872, 876, 264 P.3d 979, 983 (Ct. App. 2011) (citations omitted).

> Generally, prosecutorial misconduct will require dismissal only when it reaches the level of a constitutional due process violation. In order to be entitled to dismissal of an indictment on due process grounds, the defendant must affirmatively show prejudice caused by the misconduct. We note that dismissal is a drastic remedy and should be exercised only in extreme and outrageous situations, and therefore, the defendant has a heavy burden.

State v. Edmonson, 113 Idaho 230, 237, 743 P.2d 459, 466 (1987).

The showing of prejudice required for dismissal based on prosecutorial misconduct "means the defendant would not have been indicted but for the misconduct." Id.

> To determine whether misconduct gives rise to a dismissal, a reviewing court will have to balance the gravity and the seriousness of this misconduct with the sufficiency of the evidence supporting the probable cause finding. At one extreme, the misconduct can be so outrageous that regardless of the extent of probable cause evidence, dismissal will be required. At the other extreme, the misconduct may be so slight, that it becomes unnecessary to question the independent judgment of the grand jury. In the middle of these extremes, the court must examine the totality of the circumstances to determine whether the indictment should be dismissed. As stated above, the burden rests with the criminal defendant to make an initial showing that the misconduct rises to the level of prejudice. Absent the showing of prejudice, a reviewing court will not second guess the grand jury. However, once the defendant does affirmatively prove prejudice, the court must dismiss.

Id. See also Bank of Nova Scotia v. United States, 487 U.S. 250, 254–55 (1988). Thus, under Idaho's standards, prejudice rising to the level of a due process violation is a prerequisite to *any* dismissal where, as here, the evidence is sufficient to support a finding of probable cause.

The Idaho cases do not express any circumstances where the dismissal of an indictment for prosecutorial misconduct will result in dismissal with prejudice. Other courts that have done so provide that dismissal with prejudice is a sanction appropriate only in extreme circumstances. United States v. Campagnuolo, 592 F.2d 852, 865 (5th Cir. 1979) ("The supervisory powers of a district judge, however, allow him to impose the extreme sanction of dismissal of an indictment with prejudice only in extraordinary situations."); United States v. Slough, 679 F. Supp. 2d 55, 60–61 (D.D.C. 2010) ("dismissal without prejudice is ordinarily the only appropriate remedy" but dismissal with prejudice as a sanction may be appropriate in "extreme circumstances"). Such extreme circumstances are limited to "where the actual evidence against the defendants is tainted irrevocably, or there exists a pattern of prosecutorial misconduct that is widespread or continuous." United States v. Acquest Dev., LLC, 932 F. Supp. 2d 453, 462 (W.D.N.Y. 2013) (quotations and ellipses omitted). See also Com. v. Baker, 11 S.W.3d 585, 591 (Ky. Ct. App. 2000) (dismissal with prejudice only appropriate where "the prosecuting attorney's action irrevocably tainted the evidence or would prejudice [defendant's] case upon trial"); State v. Eder, 704 P.2d 465, 468 (N.M. App. 1985) (dismissal with prejudice appropriate only where "nothing short of a dismissal with prejudice would cure the injury suffered by defendants").

The reasons for dismissing with prejudice only in extreme cases are as follows:

> Although defendants do have a constitutional right to an informed and unbiased grand jury, they have no concomitant right to bar

> forever investigation into their alleged criminal conduct. While outrageous government conduct could taint evidence irrevocably, or prejudice a defendant's case on the merits such that notions of due process and fundamental fairness would preclude reindictment, questioning a grand jury witness in a harassing manner or prejudicing a grand jury with inflammatory remarks is generally curable. Thus, most federal courts that have dismissed indictments due to prosecutorial misconduct in the grand jury room have done so without prejudice to subsequent reindictment.

United States v. Lawson, 502 F. Supp. 158, 172 (D. Md. 1980). "Finally, the Supreme Court as well as the Ninth Circuit has repeatedly pointed out that dismissal of an indictment, particularly with prejudice, is a drastic measure. Accordingly, the Supreme Court has cautioned that when faced with prosecutorial misconduct, a court should 'tailor[] relief appropriate in the circumstances.'" United States v. Isgro, 974 F.2d 1091, 1098 (9th Cir. 1992), as amended on denial of reh'g (Nov. 25, 1992) (brackets original) (quoting United States v. Morrison, 449 U.S. 361, 365 (1981)). If there is an adequate remedy short of dismissal with prejudice, "dismissing the indictment is simply an unwarranted 'windfall' to the defendants." Id., 974 F.2d at 1099.

The Erlebachs have failed to show that allowing their re-indictment would violate due process. The error in this case falls far short of extreme circumstances that would taint the evidence or is indicative of a pattern of abuses. Any prejudice from an indictment by less than twelve qualified jurors is easily cured by dismissal without prejudice so either a complete grand jury may consider the evidence or probable cause may be established in a preliminary hearing. Moreover, the Erlebachs failed to show a pattern of abuses, much less pattern that rose to the level of incurability. Because the record does not support

the conclusion that the ultimate sanction was warranted, the Erlebachs have failed to show an abuse of discretion.

The Erlebachs' first claim of error is that the district court cited I.C.R. 48 as the legal basis for its dismissal without prejudice. (Appellants' brief, pp. 10-15.) I.C.R. 48 allows the district court to dismiss when it concludes that "such dismissal serves the ends of justice." I.C.R. 48(a)(2). Dismissal under the rule "is not a bar" to refiling "if the offense is a felony." I.C.R. 48(c). Thus, I.C.R. 48 is the legal authority allowing the district court to do what it did: dismiss without prejudice. Citing the relevant legal authority for its actions was not an abuse of discretion.

The Erlebachs argue that citing I.C.R. 48 means the court was unaware that dismissal with prejudice was an option. (Appellants' brief, pp. 10-15.) This argument does not withstand analysis. The Erlebachs argued that the district court should dismiss with prejudice as a sanction for alleged prosecutorial misconduct. (#44470 Sealed R., pp. 19-26; 5/20/16 Tr., p. 135, Ls. 4-10; p. 145, Ls. 16-23.) The state argued that such a sanction would be inappropriate, but did not claim that such a remedy was unavailable to the court. (#44470 R., pp. 113-14.) The record establishes that the district court was aware it could dismiss with prejudice, but simply declined to do so and instead dismissed under I.C.R. 48.

Next, the Erlebachs contend the district court erred by failing to make findings of fact. (Appellants' brief, pp. 15-16.) Remand for additional fact-finding is appropriate where the record is inadequate for review of the district court's

discretion. Herrera v. Estay, 146 Idaho 674, 680, 201 P.3d 647, 653 (2009) ("When the record is such that this Court is incapable of reviewing the trial court's decision for an abuse of discretion, we must remand for appropriate findings."); Vanderford Co. v. Knudson, 144 Idaho 547, 554, 165 P.3d 261, 268 (2007) ("The absence of findings may be disregarded by an appellate court where the record is clear and yields an obvious answer to the relevant question."). The record in this case, however, contains extensive findings of fact by the district court showing the basis for its decision. (#44468 R., pp. 311-18; #44470 R., pp. 119-26.[2]) There is no reason to think that any relevant facts were omitted from the district court's analysis. That the district court did not set forth in detail why it rejected the Erlebachs' other factual allegations does not show error.

Finally, the Erlebachs argue the record demonstrates that the indictments should have been dismissed with prejudice. (Appellants' brief, pp. 16-40.) Review of this argument shows it to be without merit.

The Erlebachs asserted three grand jurors endorsing the indictments, numbers 1, 19 and 11, were biased. (E.g., #44468 Sealed R., pp. 4-13.[3]) The

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[2] The only factual claims the district court expressly declined to decide related to whether two other grand jurors should have been disqualified. (#44468 R., p. 317, n. 1; #44470 R., p. 125, n. 1.)

[3] On appeal the Erlebachs admit their claim about Grand Juror 19 being biased or unqualified is based on speculation, but assert the misconduct is the prosecutor's failure to fully explore potential bias. (Appellants' brief, pp. 23-24.) They cite no authority for the proposition that the prosecutor had such a duty or that the prosecutor's voir dire of the grand jurors failed in that duty. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."). The Erlebachs' argument in relation to Grand Juror 11 is the same as in relation to Grand Juror 1: that he admitted bias and failed to unequivocally

district court did find that Grand Juror 1 had expressed bias and her statements that her bias would not affect her deliberations were equivocal. (#44468, R., pp. 314-16; #44470 R., pp. 122-24.) The Court declined to address whether Grand Jurors 19 and 11 were qualified. (#44468 R., p. 317, n. 1; #44470 R., p. 125, n. 1.) As set forth above, lack of twelve qualified grand jurors is easily remedied by dismissal of the indictment without prejudice. This is true in this case regardless of whether the number of qualified grand jurors was eleven or ten or nine.

The Erlebachs next contend the prosecutor presented false testimony or failed to present exculpatory evidence. (Appellants' brief, pp. 28-40.) The district court necessarily rejected this argument because it did not order that the state present any different evidence before a grand jury if it sought re-indictment. (#44468 R., pp. 311-19; #44470 R., pp. 119-27.) Moreover, counsel for the Erlebachs does not contend that the district court erred under the applicable legal standard. The applicable standard is that "when a prosecuting attorney conducting a grand jury inquiry is personally aware of *substantial evidence which directly negates the guilt of the subject of the investigation* the prosecutor must present or otherwise disclose such evidence to the grand jury." I.C.R. 6.2(a) (emphasis added). Counsel for the Erlebachs acknowledges that this is the

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state he could set that bias aside. (Appellants' brief, pp. 24-25.) The state submits Grand Juror 11 never stated he was biased, only that he knew one of the witnesses (the neighbor to whom K.B. fled). (Amended G.J. Tr., p. 13, L. 22 – p. 14, L. 3.) The state submits Grand Jurors 19 and 11 were qualified. At a minimum a good faith belief by the prosecutor that they were qualified was warranted.

applicable legal standard. (Appellants' brief, p. 34.[4]) However, at no point does counsel for the Erlebachs make any attempt to apply the correct legal standard or make any argument based on the correct legal standard. (Appellants' brief, pp. 28-34.) Rather, counsel argues only that the prosecutor "repeatedly failed to disclose exculpatory evidence." (Appellants' brief, pp. 28-29, 31-34, 36, 38.) The rule imposes no duty on the prosecutor to present every bit of impeaching evidence or evidence that might support some theoretical defense. Because the Erlebachs' argument is not based on the correct legal standard, and does not actually articulate how the prosecutor allegedly violated the requirements of I.C.R. 6.2, their claim of error by the trial court fails.

Even if this Court were willing to undergo a factual analysis of the Erlebachs' claims, application of the correct legal standard to the record shows them to be lacking any merit. First, the Erlebachs claim that all the witnesses lied, asserting the photographic evidence is contrary to their testimony. (Appellants' brief, pp. 28-33.) This argument does not withstand even a cursory review of the officers' video and the other photographic evidence. To the contrary, the photographic and video evidence corroborates the testimony of the witnesses. (State's Exhibits 1, 2.)

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[4] Counsel at another point misstates the standard: "Idaho Criminal Rule 6.2 states that a prosecutor must present or disclose known exculpatory evidence to the grand jury." (Appellants' brief, p. 33.) To the extent counsel is arguing that the prosecutor has a duty under the rule to present all impeaching evidence and all evidence that would support a defense theory, such a claim is directly contrary to the plain language of the rule. See In re Schroeder, 147 Idaho 476, 479, 210 P.3d 584, 587 (Ct. App. 2009) ("Where the language of a rule is plain and unambiguous, courts give effect to the rule as written, without engaging in construction.").

The Erlebachs will have ample opportunity to claim that the officers' videos of a violent struggle contradict the officers' testimony that Tyrell fought them and had to be subdued. They will also have opportunity to argue that evidence of the victim's statement of her opinion that Tyrell's actions—taking off his clothes, getting on her naked and pulling aside her underwear while threatening to show her what his penis could do—did not constitute attempted rape is admissible and that it establishes his innocence. The state believes such evidence and arguments will not raise even a reasonable doubt. At a minimum there is no good faith basis to conclude all the witnesses perjured themselves, and even a cursory review shows that the videos are not "substantial evidence which directly negates the guilt of the subject" of the grand jury.

Finally, the Erlebachs contend the prosecutor presented hearsay evidence. (Appellants' brief, p. 35.) "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). The actual exchange was as follows:

> Q Okay. Did you do any sort of forensic or sexual investigation or exam on [K.B.]?
>
> A No.
>
> Q Was there a basis to believe you needed to do so?
>
> A No. She had said that Tyrell had attempted to force himself on her but hadn't actually succeeded in doing so.
>
> Q So no internal or—
>
> A No.

Q --direct sexual contact?

A No. …

(G.J. Tr., p. 82, Ls. 9-19.) From this context it is clear that the evidence of K.B.'s statement was not admitted to prove the truth of the matter asserted, but instead to establish why the officer did not pursue a rape kit or other sexual assault forensic investigation.[5] The Erlebachs have failed to show that inadmissible hearsay was presented, much less that it was presented egregiously such that dismissal of the indictment without prejudice was an inadequate remedy for the error.

The Erlebachs have failed to establish any clear error in the district court's implicit rejection of their claims of prosecutorial misconduct other than failure to disqualify Grand Juror 1. They have also failed to establish that this case presents extreme circumstances under which the district court could exercise its discretion in no other way than to dismiss with prejudice.

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[5] Implicit in counsel's argument is the underlying belief that K.B.'s statement that Tyrell had tried to remove her underwear without her permission while naked and threatening to show her what his penis would do—K.B.'s consistent recitation of the facts in question—did not constitute a statement that Tyrell had tried to force himself on her. The state asserts that characterizing K.B.'s consistent factual assertion regarding Tyrell's actions as saying that Tyrell had attempted to force himself on her was both accurate and reasonable.

CONCLUSION

The state respectfully requests this Court to affirm the district court's dismissal without prejudice.

DATED this 10th day of March, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of March, 2017, served a true and correct copy of the foregoing JOINT BRIEF OF RESPONDENT by emailing an electronic copy to:

DENNIS BENJAMIN
NEVIN, BENJAMIN, McKAY & BARTLETT LLP

at the following email addresses: db@nbmlaw.com and lm@nbmlaw.com.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd