

BEFORE THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MAYOR CAROLYN COMITTA, : SUPREME COURT DOCKET
COUNCIL PRESIDENT HOLLY BROWN, : NO. 2 MM 2012
WILLIAM J. SCOTT, JR., HERBERT :
A. SCHWABE, II, JANE HEALD :
CLOSE, FLOYD ROBERT BIELSKI, :
DAVID LALEIKE, E. BRIAN ABBOTT, :
NATHANIEL SMITH and W. DONALD :
BRACELAND, :
PETITIONERS :
:
VS. :
:
2011 LEGISLATIVE REAPPORTIONMENT: :
COMMISSION, :
RESPONDENTS :

BRIEF OF THE PETITIONERS, MAYOR CAROLYN COMITTA, COUNCIL
PRESIDENT HOLLY BROWN, WILLIAM J. SCOTT, JR., HERBERT A.
SCHWABE, II, JANE HEALD CLOSE, FLOYD ROBERT BIELSKI, DAVID
LALEIKE, E. BRIAN ABBOTT, NATHANIEL SMITH
AND W. DONALD BRACELAND

(The Petitioners have challenged the division of the
Borough of West Chester in the reapportionment division of the
new 156th and 160th Pennsylvania House Legislative Districts.)

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III. STATEMENT OF JURISDICTION

The basis for the jurisdiction of this Court is Section 17(d) of Article 2 of the Pennsylvania Constitution and 42 Pa. C.S. 725(1), which provides that the Supreme Court shall have exclusive jurisdiction of appeals from final Orders of certain constitutional and judicial agencies, including the Legislative Reapportionment Commission.

IV. STATEMENT OF SCOPE AND STANDARD OF REVIEW

1. The standard and scope of review in a reapportionment challenge is limited as follows:

“In interpreting the Equal Protection Clause, the Supreme Court of the United States has repeatedly recognized that reapportionment is primarily a matter for legislative consideration and determination... In addressing the limited, Constitutional nature of judicial review of reapportionment matters, the Supreme Court of the United States has rejected a litigant’s claim that a state reapportionment should be invalidated merely because the alternative plan proposed by the litigant is a better one... Thus, to prevail in their challenge to the final reapportionment plan, Appellants have the burden of establishing not, as some of the Appellants have argued, that there exists an alternative plan which is preferable or better, but rather that the final plan filed by the Pennsylvania Reapportionment Commission fails to meet Constitutional requirements.” In Re Reapportionment Plan for Pennsylvania General Assembly, 442 A.2d 661, 665 (Pa., 1981).

V. ORDER OR OTHER DETERMINATION

The Petitioners are seeking review of the 2011 Legislative Reapportionment Commission Order dated December 12, 2011. This determination by the Pennsylvania Reapportionment Commission created new Districts for the House, Legislative Districts 156 and 160, which essentially split the Borough of West Chester in half. Attached and marked Exhibit "A" is the Final Plan for the Pennsylvania House new Districts 156 and 160. Attached and marked Exhibit "B" is the map of the Final Plan for the Pennsylvania House Districts as published in the Daily Local News of Chester County on January 5, 2012. Attached and marked Exhibit "C" is the Legislative District Plan for Chester County, as published in the Daily Local News on January 5, 2012.

VI. STATEMENT OF THE QUESTIONS INVOLVED

1. Did the 2011 Legislative Reapportionment Commission fail to satisfy the requirements of the Pennsylvania Constitution, Article 2, Section 16 when it split the Borough of West Chester, the County seat of Chester County, placing half the Borough in the new 156th and the other half in the new 160th Pennsylvania State House Districts? Should the Legislative Reapportionment Commission be allowed to now disregard the clear mandate of the Pennsylvania Constitution not to divide city, borough, etc. in a representative district?

2. Did the 2011 Legislative Reapportionment Commission ignore the past judicial finding of 100 years of past voting discrimination in the Borough of West Chester when it divided the minority community, thereby diluting the voting strength of the minority population of West Chester? Did the splitting of the Borough of West Chester and its minority community in the reapportionment have, as one of its purposes, to minimize or cancel out the voting strength of the minority community in the Borough of West Chester? Did the division violate 42 U.S.C.A. 1973 of the Federal Voting Rights Act?

VII. STATEMENT OF THE CASE

The Petitioners, Mayor Carolyn Comitta of the Borough of West Chester, Council President Holly Brown of the Borough of West Chester, and residents and registered voters of the Democratic party, the Republican party, and the Independent party, William J. Scott, Jr., Herbert A. Schwabe, II, Jane Heald Close, Floyd Robert Bielski, David LaLeike, E. Brian Abbott, Nathaniel Smith and W. Donald Braceland, have challenged the December 12, 2011 determination of the 2011 Pennsylvania Legislative Reapportionment Commission. The said determination is attached and marked as Exhibit "A" to this Brief.

The old Pennsylvania House Legislative District 156 included essentially the entire Borough of West Chester. The Reapportionment Commission proposal, as seen in Exhibit "A", cuts West Chester in half. West Chester Wards 1, 2, 6 and 7, which are in essence the northern side of the Borough of West Chester, are in the new 156th District. The new House Legislative District 160, which is essentially the southern part of the Borough of West Chester, encompasses Wards 3, 4 and 5. The new 160th District extends through the southern half of West Chester into Delaware County including Upper Chichester and Aston, among other areas. These areas in Delaware County have

very different interests and goals than the Borough of West Chester.

Mayor Carolyn Comitta, one of the Petitioners, actually appeared during the November 23, 2011 Reapportionment hearing. Statements were submitted by other Petitioners.

West Chester is a very compact borough. It was incorporated in or about 1788 and has been the County seat for over 200 years. It provides an identity for all the surrounding areas.

West Chester has a strong business community, two District Justice offices and the County Courthouse. It has numerous restaurants, art galleries and small businesses. It also contains the majority of West Chester University.

West Chester has great historical significance because of its role as the County seat in Chester County. It is also the home of the County government. It has a population of approximately 18,000 citizens.

The Borough of West Chester has a history of discriminating against the minority population. In the case of In the Matter of the Petition to Establish Wards in the Borough of West Chester, 36 Chester County Reporter 12 (CCP Chester Cty., 1988), former President Judge Stively, after 7 days of trial, found over 100 years of voting discrimination against the minority population and, therefore, changed the voting pattern in West

Chester from an at-large system to a Ward system. Judge Stively ruled as follows:

"The evidence here presented establishes that the chief purpose behind the institution of the present at-large system was to reduce the voting power which the black residents had previously enjoyed under the defacto Ward system." Id 20.

The current proposal dividing West Chester into the new 156th and 160th Legislative Districts splits the minority populations of both black and Hispanic voters and citizens. The second Ward has a strong minority and black population and the sixth Ward also has a strong Hispanic and black population. They are now lumped with two overwhelmingly white Wards, the first and seventh in the new 156th District. Wards 3 and 5, which also have significant minority populations, have been placed into the new 160th District.

The Borough of West Chester has a minority population of 30 to 35 percent, which is now split. The surrounding areas in the new House Districts are predominantly Caucasian. This means that the new Legislative Plan has split, in essence, the main concentration of minority voters in the area now encompassed by the new 156th and 160th House Legislative Districts.

There was not one consideration made by the 2011 Legislative Reapportionment Commission noting the 100 year past history of discrimination against minority voters in the West Chester area.

The Petitioners sought the pro bono counsel of Samuel C. Stretton, Esquire. As a result, the Petition for Review was filed on Tuesday, January 10, 2012 by Mr. Stretton on behalf of the Petitioners. An immediate briefing schedule was established with a brief due on Friday, January 13, 2012. Mr. Stretton, since he was in trial, immediately asked for an extension of one day until Monday, January 16, 2012, but that was denied by Order of the Pennsylvania Supreme Court dated Wednesday, January 11, 2012. Obviously, due to the lack of time, this Brief cannot be as complete as one would hope.

The Petitioners are seeking review by this Honorable Court of the 2011 Legislative decision dividing the Borough of West Chester in half, which is in total contradiction to the Pennsylvania Constitution, Article 2, Section 16.

VIII. SUMMARY OF ARGUMENT

1. The Petitioners, Mayor Carolyn Comitta, et al, respectfully contend that the creation of the new 156th and 160th Pennsylvania Legislative House Districts, which divide, in essence, the Borough of West Chester in half violates Article 2, Section 16 of the Pennsylvania Constitution. That particular section requires, unless there is an absolute necessity, that all boroughs and townships, etc. not be divided.

West Chester is the County seat and has a long history of being the center of activity in the Chester County area. For years, it has been in the old 156th Legislative District, which essentially comprised all of West Chester. There is a unity of purpose in West Chester. There is a strong business district. That has now been divided in half with the southern half of the borough going into a legislative district that is essentially Delaware County based.

The Petitioners argue that this Honorable Court should give greater consideration to Article 2, Section 16. They argue that, in the past Court decisions, beginning in the 1970's in cases on reapportionment, this Court has repeatedly found that the equality of vote trumps Article 2, Section 16. Those decisions were based originally on the United States Supreme Court decisions that were very rigid in their requirement for equal voter population divisions. The United States Supreme

Court has broadened that over the years but this Honorable Court has not reflected the same. Therefore, in reviewing these matters, this Honorable Court should give due consideration not only to the need for equality but, if there is another plan that provides equality and also maintains the compactness of a borough, then that plan should be considered and adopted. In this case, the Plan of the 2011 Legislative Reapportionment Commission splitting the Borough of West Chester ignored this constitutional provision. In looking at the totality, there are other plans, as suggested by the Petitioners, which would allow for the equality of voting population to also be consistent with the need for compactness of the municipality, as required by Article 2, Section 16. The Petitioners request that this Honorable Court reject the Plan of the House Reapportionment Commission.

2. The Petitioners respectfully contend that the splitting of the Borough of West Chester divided the minority population in the borough. West Chester has a strong minority population of approximately 30 percent black and Hispanic. In 1987, there was a finding by the Court of Common Pleas of Chester County, as seen in Exhibit "E" to this brief, that there was 100 years of voting discrimination in the Borough of West Chester. The current Legislative Plan splits the minority community and puts the now divided minority areas in primarily

white districts, specifically the 156th and 160th Legislative Districts. This will completely dilute the strong voting bloc of minority votes, which is found in the center of West Chester. This also violates the requirements of the Federal Voting Rights Act under 42 U.S.C.A. 1973. Because of this, the Reapportionment Plan should be rejected.

IX. ARGUMENT

A) The 2011 Legislative Reapportionment Commission division of the Borough of West Chester into the 156th and 160th Pennsylvania House Districts failed to satisfy the requirements of the Pennsylvania Constitution, Article 2, Section 16.

The Borough of West Chester, which is the county seat of Chester County, had a fairly stable population in the last 20 years of approximately 18,000 residents. The borough is diverse and is truly the center of Chester County. Not only does the county government have its offices in the Borough of West Chester but the Court of Common Pleas does as well. The borough has a strong business community, numerous restaurants and art galleries. The Borough is the home of a good portion of West Chester University.

The Borough of West Chester is over 200 years old. Traditionally, the borough has primarily been in one Pennsylvania House Legislative District. It has a strong historical background. It began when an old inn called Turks Head Inn was at the intersection of High and Market Streets in West Chester. That was a stopping point on the way to Wilmington, Delaware. Gradually, a town formed around that area. In the 1780's, Chester County and Delaware County were divided and the Chester County Courthouse was moved from the city of Chester to the center of the Borough of West Chester.

The Courthouse remained in that location until approximately two years ago when it was moved three blocks down on Market Street after a new courthouse was built in the Borough of West Chester.

There is no dispute that the Borough of West Chester is a strong community, which provides identity and purpose for the County of Chester.

Although political considerations are not normally a factor, it is clear that the borough was divided because of its strong Democratic vote in recent years. While it was once a strong Republican borough, over the years it has changed and it now has more Democrats than Republicans. From 2006 to 2010, the House seat in the Borough of West Chester was won by a Democratic representative for the first time in almost 100 years. During the 2010 elections, that seat was returned to the Republican party. The surrounding areas in West Chester are more Republican than Democrat. Apparently, the concern was that the Democrats would retake the House seat in the year 2012 with a strong unified Democratic vote. As a result, the Borough of West Chester was divided in half with the northern half going into the new 156th Pennsylvania House District and the southern half going into the new 160th House District. The 160th District goes all the way down to the County of Delaware, which is a heavily Republican district.

Having said that, it is understood that political considerations are not be the basis for changes in a Reapportionment Plan.

The essence of the current argument is that the splitting of the Borough of West Chester, as seen from Exhibit "A", violates Article 2, Section 16 of the Pennsylvania Constitution. That particular section reads as follows:

"The Commonwealth shall be divided into 50 senatorial and 203 representative districts, which shall be composed of compact and contiguous territory that is nearly equal in population as practical. Each senatorial district shall elect one senator, and each representative district one representative. Unless absolutely necessary, no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district." See Article 2, Section 16 of the Pennsylvania Constitution (emphasis supplied).

There is no question that the dictates of this Constitutional provision were violated by the division of the Borough of West Chester.

In the modern era of reapportionment after the 1968 Constitutional changes, the concept of equality of the population within each legislative district has prevailed. This was the result of Reynolds vs. Sims, 377 U.S. 533, 84 Sup. Ct. 1362 (1964), involving the one person/one vote concept. The Sims case, as seen from the case law, provided the catalyst for ignoring Article 2, Section 16 of the Pennsylvania Constitution.

In the 1970 Reapportionment court hearing, the case of Commonwealth ex rel Specter vs. Levin, 293 A.2d 15 (Pa., 1972), held that the legislative reapportionment plan achieved its constitutional requirement of one person/one vote under the Equal Protection Clause. The Pennsylvania Supreme Court, although discussing Article 2, Section 16 of the Pennsylvania Constitution, found that the overriding objective has to be substantial equality of population. The Court said, "It is not constitutionally permissible to totally achieve Section 16's objective of respecting the boundaries of political subdivisions." Id 19.

After the aforementioned Specter case, the United States Supreme Court came down with Gaffney vs. Cummings, 412 U.S. 735, 93 Sup. Ct. 2321 (1973). The Gaffney case was significant since it seemed to provide a little more flexibility to the aforementioned Sims fairly strict one person/one vote requirement with very little deviation. In Gaffney, deviations as high as 7.8 percent were allowed. This, to some extent, brought into question the rather strong language in Specter which essentially trumped Article 2, Section 16 of the Pennsylvania Constitution because of the one person/one vote rule in Sims.

The case of In Re Reapportionment Plan for the Pennsylvania General Assembly, 442 A.2d 661 (Pa., 1981), appeared not to

recognize the greater deviation in population allowed by the United States Supreme Court in the aforementioned Gaffney case. Although citing the aforementioned Gaffney case, Id 665, 666, the Pennsylvania Supreme Court rejected the appeal even if the proposed alternative plan appeared better than the Legislative Reapportionment Committee's Plan. The Pennsylvania Supreme Court cited the aforementioned Specter case. Id 665, 666. The Court rejected the appellants' argument that the maintenance of political subdivisions was important as was the goal of maximum population equality. Id 666, 667. The Court, in noting the appellants' argument that the Supreme Court of the United States was allowing greater deviation, held,

"The critical fact that adherence to a percentage deviation that is at the outside limits of constitutionality cannot be squared with the overriding constitutional objective of substantial equality of population among districts." Id 666, 667.

The Court developed a very strict standard of review. The Court noted that the goal was not to pick what would be the better plan but only to ensure that the Plan presented by the Commission met the constitutional requirements of equality of vote. There were strong dissenting votes in that particular decision by three of the then Pennsylvania Supreme Court Justices.

The next major decision regarding reapportionment was In Re 1991 Pennsylvania Legislative Reapportionment Commission, 609 A.2d 132 (Pa., 1992). In this particular decision, the Pennsylvania Supreme Court still maintained its very narrow standard of review. The Court noted the appellants had the burden of establishing not that there exists an alternative plan that was better but, rather, that the Final Plan fails to meet the constitutional requirements, the same burden as set forth in the past. Id 344. The Pennsylvania Supreme Court again recognized, "the inherent conflict in the Pennsylvania Constitution between the goal of equality of population and the prohibition against dividing towns and boroughs." The appellants in the 1992 case argued that population equality was not so important as to warrant division of counties. In that case, the appellants cited federal precedent that allowed counties to have as much as a 16 percent deviation. The Court maintained that the overriding objective has to be equality of population.

Recently, in the year 2002, there was the case of Albert vs. 2001 Legislative Reapportionment Commission, 790 A.2d 989 (Pa., 2002). Mr. Albert raised the same issue about the reapportionment dividing several boroughs. The Court cited all the previous cases and, again, concluded that the Reapportionment Plan passed Constitutional muster. The Court

again cited the old Specter case. Id 666, 667. Mr. Albert was criticized by the Pennsylvania Supreme Court for focusing on the impact of the plan with respect to the political subdivisions rather than looking at the plan as a whole.

There was an interesting concurring opinion by Justice Saylor setting forth some of his concerns about how the compactness and integrity of the subdivisions have been applied by the Court in the past.

A summary of the Pennsylvania Supreme Court's past decisions in this modern world of reapportionment essentially boils down to the fact that the Court has held, beginning in 1972, reaffirming in 1981, reaffirming in 1991 and reaffirming again in 2002, that the equality of population trumps the need for compactness as required by Article 2, Section 16, of the Pennsylvania Constitution. Because of that, the Court essentially has approved the Reapportionment Plans if the deviations are small and the Plan meets the otherwise constitutional concept of equality.

It is time for this Court to reconsider its stringent approach in these past decisions. There is no reason why Article 2, Section 16 cannot be reconciled with the equality of vote and no reason why this Honorable Court should not consider alternative plans even if the Legislative Reapportionment Commission's Plan meets constitutional muster when Article 2,

Section 16 is violated. There is great benefit in maintaining the integrity of a borough, particularly the county seat in Chester County. To divide that into two legislative districts has a very negative impact. The district is divided into two, which includes the business district and other aspects. There will no longer be the continuity that a borough would look for in one legislative district from their representative. This Court should not ignore the mandate of Article 2, Section 16 of the Pennsylvania Constitution, as previous Courts have done.

The alternative plan, which is marked as Exhibit "D", also clearly meets the constitutional muster of one person/one vote, i.e. voter equality. If there is an alternative plan that meets that constitutional muster but also respects the Constitutional mandate under Article 2, Section 16, which the Legislative Reapportionment Plan does not, then this Honorable Court should broaden its scope of review.

This Honorable Court has never gotten away from the original concept in the aforementioned Sims case of very strict equality. But the case law in Sims has evolved and the United States Supreme Court has allowed much greater deviations. That being the case, this Honorable Court should then give greater weight to Article 2, Section 16 and its impact and the failure of the Legislative Reapportionment Commission to recognize that and maintain the integrity of the Borough of West Chester.

The tragedy of not doing so is seen in the Borough of West Chester. The southern half of the borough is being essentially put into Delaware County in a legislative district that will have interests far different than what is needed for the county seat. The Pennsylvania Constitution should not be so quickly disregarded with general rhetoric of equality if there are better plans which maintain equality but also preserve the integrity of West Chester.

It is time in this modern world for this Honorable Court to reconsider the errors of these earlier decisions, which used equality as the only lynchpin and ignored Article 2, Section 16.

In conclusion, the Petitioners respectfully request this Honorable Court reject the current plan dividing West Chester and review the Petitioners' alternative Legislative Plan. The Petitioners further request that this Court adopt their alternative plan and not allow the division of the Borough of West Chester.

B) The division of the Borough of West Chester dilutes minority voting strength and should be rejected. Further, the dilution of the vote is in violation of the Federal Voting Rights Act under 42 U.S.C.A. 1973.

The Borough of West Chester has a strong minority community. Approximately 25-30 percent of the population is

black and another 10 percent or more of the population is Hispanic.

Unfortunately, there has been a history of discrimination against minority voters in the Borough of West Chester. This was emphasized and found by former President Judge Stively of the Court of Common Pleas of Chester County in a very important decision that resulted in the Borough of West Chester being changed from an at-large system to a Ward system. This decision is found at In the Matter of the Petition to Establish Wards in the Borough of West Chester, 36 Chester County Reporter 12 (CCP Chester Cty., 1988). As noted earlier, Judge Stively found approximately 100 years of voting discrimination and ordered that the voting system be changed to a Ward system. This decision is attached hereto and marked Exhibit "E".

With this history of discrimination against minorities in the Borough of West Chester, it was particularly important not to divide the minority vote. As noted above, the Borough of West Chester has a strong minority population. The surrounding areas in Chester County are primarily white, including the areas going into Delaware County.

The current Plan essentially splits the minority community in West Chester in half. Wards 1, 2, 6 and 7 are in the new 156th Legislative District while Wards 3, 4 and 5 are in the new 160th District. Wards 3 and 4 have strong minority populations,

as does Wards 2 and 6. With this new Plan, the minority vote is split and severely diluted.

The concept of diluting minority voting strength is discussed in the aforementioned case of In Re Apportionment Plan for General Assembly, 442 A.2d 661 (Pa., 1981). The Pennsylvania Supreme Court noted as follows:

“Allegations that districts have been the subject of gerrymandering to dilute the voting strength of minorities are not supported. A Reapportionment Plan may be invalid because it fences out racial or ethnic groups so as to deprive them of their pre-existing municipal vote... or because it operates to minimize or cancel out the voting strength of racial or political elements of the voting population... To sustain a constitutional claim that district lines have been racially or ethnically gerrymandered, it is essential to prove a discriminatory purpose. It must be proved that the challenged plan was conceived or operated as a purposeful device to further racial discrimination.” Id 668.

The difference between the current case and the old 1981 Reapportionment case is the finding of voting discrimination against minorities in Judge Stively's decision of 1987, which was some 24 years ago.

It is clear that this finding was given no consideration or even discussed by the Reapportionment Commission. Instead of allowing a strong minority vote centered in West Chester for a legislative candidate, the Commission split the borough in half and gave not even lip service to the prior findings of discrimination. The southern half and the northern half of the Borough of West Chester go into strongly white populated

districts and, essentially, preclude any significant minority voting or influence in either the 156th or 160th Legislative District.

In terms of intentional discrimination without a hearing or discovery, it is almost next to impossible to prove. But, the failure to address the history of voting discrimination against minorities in the Borough of West Chester speaks volumes for the need for this Court to rectify this situation. As it stands now, in the areas encompassed by the new 156th and 160th Legislative Districts, the strongest minority community is found right in the center of the Borough of West Chester. That community has been split without any good reason or cause.

In the case of In Re 1991 Pennsylvania Legislative Reapportionment Commission, 609 A.2d 132 (Pa., 1992), the Pennsylvania Supreme Court discussed again the issue of intentional discrimination on the basis of race. The Court indicated intentional discrimination had to be shown against an identifiable political group, an actual discriminating effect on the group and a history of disproportionate results. Id 142.

The Federal Voting Rights Act, 42 U.S.C.A. 1973, prohibits infringement on the right to vote based on voting qualifications. The Pennsylvania Supreme Court noted the burden of proof and the minority population group must be able to demonstrate that it is sufficiently large and geographically

compact. In West Chester, it is approximately 30 plus percent of the vote. Second, the minority group must be able to show it is politically cohesive. The voting patterns, particularly with the election in the past of a black mayor and council people, demonstrate that. Third, the minority must be able to demonstrate that the white majority votes in bloc to defeat the minority's preferred candidates. That was shown in the aforementioned Ward system case and would again clearly occur if the minority population is cut in half and placed in two new legislative districts.

Therefore, in evaluating this challenge, the Voting Rights Act under 42 U.S.C.A. 1973 has to be considered. This was not addressed by the Commission.

In conclusion, the Petitioners respectfully request this Honorable Court reject the Plan by the Reapportionment Commission and adopt their alternative Plan or remand for further consideration. The reason is the current plan severely splits and dilutes the voting power of minority citizens by dividing this vote into two new Pennsylvania House Legislative Districts.

X. CONCLUSION

The Petitioners, Mayor Carolyn Committa, et al, by their counsel, Samuel C. Stretton, Esquire, respectfully requests this Honorable Court, for all the reasons set forth in this brief, find that the 2011 Legislative Plan to divide the Borough of West Chester into the new 156th and 160th Pennsylvania House Districts not be approved and, further, that this matter be remanded for consideration of the Petitioners' alternative plan.

Respectfully submitted,

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AVERMENT

Samuel C. Stretton, Esquire, counsel for the Petitioners in the captioned matter, hereby avers that the material contained in the CD-Rom is an accurate and complete representation of the paper version submitted to the Court.

Respectfully submitted,

Date

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