IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2018

No. 24

STATE OF MARYLAND,

Petitioner,

v.

ADNAN SYED,

Respondent.

On Writ of Certiorari to the Court of Special Appeals
September Terms, 2013, 2016
Case Nos. 1396, 2519

REPLY BRIEF OF RESPONDENT/CROSS-PETITIONER

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INTRODUCTION

The Court of Special Appeals minted a new interpretation of the waiver provision in Maryland's postconviction statute. It held that while a petitioner's first claim of ineffective assistance of counsel is premised on a fundamental right and is therefore subject to the rigorous statutory standard requiring a knowing and intelligent waiver, any *subsequent* ineffective-assistance claim is "based on a *non*-fundamental right for the purpose of waiver" and therefore falls outside the statutory waiver standard. E000070–71 (emphasis added). This relabeling has no basis in the plain language of the statute, undermines the legislature's intent to provide extra protection for certain fundamental rights, and does not square with this Court's longstanding interpretation of the statutory waiver provision in *Curtis v. State*, 284 Md. 132 (1978).

The State does very little to defend the Court of Special Appeals' fundamental-right/non-fundamental right, now-you-see-it/now-you-don't analysis. The State fails to identify any support in the statute or Maryland case law for the proposition that an allegation of error premised on a fundamental right is somehow converted into an assertion of a *non*-fundamental right because it invokes the same right as a prior claim. The factual distinctions that the State identifies between *Curtis* and this case are immaterial. And the State's protestations that applying the statutory waiver standard to Syed's claim would lead to endless postconviction appeals ring hollow. The legislature has designed multiple other safeguards to promote finality, including giving circuit courts broad discretion to decline to reopen postconviction proceedings and creating a presumption that the failure previously to raise an allegation of error was intelligent and

knowing. Nothing in the legislature's amendments to the postconviction statute suggest that further restrictions on the statutory waiver standard are warranted; indeed, the relevant language in the statutory waiver provision has remained untouched since *Curtis* was decided.

This Court should correct the Court of Special Appeals' waiver analysis and remand for consideration of Syed's claim of ineffective assistance based on trial counsel's failure to use a critical document to cross-examine the State's expert on cell-phone location data.[1]

ARGUMENT

I. THE COURT OF SPECIAL APPEALS' WAIVER ANALYSIS WAS WRONG.

The waiver question in this case has a straightforward answer. Section 7-106(b)(1)(i) of the postconviction statute provides that an "allegation of error" is not waived unless "a petitioner could have made but intelligently and knowingly failed to make the allegation" in a prior proceeding. Md. Code Ann., Crim. Proc. § 7-106(b)(1)(i).

[1] The State asserts in a footnote that this Court should also address the Court of Special Appeals' finding that the Circuit Court appropriately reopened postconviction proceedings to address Syed's cell-phone claim. *See* State's Reply at 36–37 n.5. But the State has failed to preserve that issue for review by not raising it in its petition for certiorari. *See* Md. Rule 8-131(b)(1); *see also Sturdivant v. Maryland Dep't of Health & Mental Hygiene*, 436 Md. 584, 587 n.2 (2014) (refusing to consider issue "not included in the questions presented"); *Washington Suburban Sanitary Comm'n v. Bowen*, 410 Md. 287, 293 n.4 (2009) (issue "not encompassed by the questions presented. . . . is not before" the Court). Nor can the State resuscitate that argument now. *See Jones v. State*, 379 Md. 704, 713 (2004) ("[A]n appellate court ordinarily will not consider an issue raised for the first time in a reply brief."). In any event, as the Court of Special Appeals found, the Circuit Court's reopening was not an abuse of discretion. *See* E000049–55; Br. of Appellee, *State v. Syed*, No. 1396, at 12–18 (Md. Ct. Spec. App., Mar. 29, 2017).

In *Curtis*, the Court interpreted this statutory waiver provision to apply only to allegations premised on a fundamental right, observing that the legislature in enacting the waiver statute had invoked the common-law practice of requiring intelligent and knowing waiver of such rights. 284 Md. at 148, 150 n.7. One such allegation is that of ineffective assistance of counsel, which is premised on the fundamental right to counsel. *Id.* at 150–151. Here, Syed has raised an allegation of ineffective assistance of counsel based on trial counsel's failure to use critical evidence to cross-examine the State's expert on cell-phone location data. As the Circuit Court found, Syed did not intelligently and knowingly waive this allegation of error in any previous proceeding. Thus, this allegation is not barred from review.

The Court of Special Appeals, however, eschewed the statutory waiver provision as interpreted in *Curtis* and found that Syed's additional ineffective-assistance claim need not be knowingly and intelligently waived. *That* ineffective-assistance claim, the court explained, was "based on a *non*-fundamental right for the purpose of waiver." E000070–71 (emphasis added). That analysis is wrong, and none of the State's attempts to defend it withstand scrutiny.

A. The Court Of Special Appeals' Distinction Between "Issues" And "Grounds" Is Inconsistent With The Statute and Unsupported By Any Prior Case.

Syed's claim of ineffective assistance of counsel relating to cell-phone location data is an independent "allegation of error" within the meaning of the postconviction statute. Md. Code Ann., Crim. Proc. § 7-106(b)(1)(i). A plain reading of the statute indicates that an "allegation of error" is an allegation that would entitle Syed to relief

from his conviction and sentence. *See id.* § 7-106(a) (describing an "allegation of error" as the basis for relief that courts decide "on the merits"). And that is exactly what Syed's cell-tower claim would do: Once established, it would entitle Syed to relief, regardless of whether other allegations of ineffective assistance of counsel failed. *Compare Syed v. State*, No. 10432, 2016 WL 10678434, at *30 (Md. Cir. Ct. June 30, 2016) (granting a new trial based on the cell-tower claim), *with* E000124–125 (granting a new trial based on the alibi claim). And because this independent allegation of error, like the alibi claim, is premised on the fundamental right to counsel, it may only be waived knowingly and intelligently. *See Curtis*, 284 Md. at 150–151.

Rather than following the plain language of the statute, the Court of Special Appeals introduced an unwritten distinction between "the issue of a violation of a fundamental right"—which is subject to the statutory waiver standard—and "the grounds supporting such a claim"—which apparently are not. E000065. This novel distinction has no basis in the plain language of the statute, and is inconsistent with how ineffective-assistance claims are analyzed in analogous contexts. *See* Resp't Br. at 43–44; *see also Cirincione v. State*, 119 Md. App. 471, 504-506 (1998) (treating ineffective-assistance claim based on trial counsel's failure to request certain jury instructions as separate "allegation of error" that must be pled with specificity in a postconviction petition under Maryland Rule 4-402(a)).

It is no surprise, then, that the State shrinks from the Court of Special Appeals' new "issues" and "grounds" distinction, spending less than two pages on the topic. *See* State's Reply at 43–44. And in that fleeting discussion, the State—like the Court of

Special Appeals—fails to identify any justification in the language of the statute for distinguishing between "issues" and "grounds," or for labeling one ineffective-assistance claim as premised on a fundamental right but the second as premised on a non-fundamental right.

Instead, the State attempts to prop up the distinction by arguing that it reflects how Maryland courts have consistently interpreted the statutory waiver standard. *See* State's Reply at 43–44. But the State fails to identify a single case—not one—in which a Maryland court has held that subsequent allegations of error implicating the same fundamental right as a prior allegation of error fall outside the heightened statutory waiver standard. The most that the State can come up with are the same two cases that the Court of Special Appeals identified, *Wyche v. State*, 53 Md. App. 403 (1983) and *Arrington v. State*, 411 Md. 524 (2009). *See id.*

Neither *Wyche* nor *Arrington*, however, establishes a carve-out from the statutory waiver standard for new allegations of error premised on the same fundamental right as prior allegations of error. The Court of Special Appeals certainly suggested this approach in *Wyche*, but it did so in *dicta*, in a footnote, and without citing any statutory or legal authority in support. *See Wyche*, 53 Md. App. at 407 n.2. The issue in *Wyche* was not whether an allegation of error premised on the same fundamental right as a prior allegation was subject to the statutory waiver standard. Rather, the only issue in that case was whether the right to be present at trial—which had been implicated for the first time in petitioner's third postconviction proceeding—was sufficiently "fundamental" to trigger the statutory waiver standard. *See id.* at 408–09 (remanding for circuit court to apply

statutory intelligent-and-knowing waiver standard to petitioner's claim). The lower court's unsupported comment about how the standard might apply in other circumstances can and should be disregarded.

In *Arrington*, for its part, this Court analyzed a different issue altogether: the scope of proceedings re-opened under a separate and specialized provision of the postconviction statute, Section 8-201, which allows courts to consider new DNA evidence. 411 Md. at 547. The petitioner in that case had argued that a petition re-opened under Section 8-201 is open-ended for all purposes, and is not subject to any waiver principles. *Id.* at 539 (noting "[p]etitioner's position that a reopening of post-conviction proceedings pursuant to § 8–201, *ipso facto* reopens all issues, regardless of any claims of waiver, abandonment or that claims have been fully litigated"). This Court disagreed, pointing to the statute's singular purpose. As the Court explained, "[t]he legislature intended § 8–201 to provide a mechanism for those with claims of 'actual innocence' to utilize favorable scientific evidence at any time to prove their innocence. The statute was not designed to open the floodgates of otherwise structured and constricted post-conviction law." *Id.* at 539–540. Thus, a "petitioner may not assert, in a post-conviction proceeding reopened under the authority of [§] 8–201, claims that could have been, but were not, raised in the original post-conviction proceeding, *other than claims based on the results of the postconviction DNA testing*". *Id.* at 545 (emphasis added). The Court's reasoning thus extended as far as that specialized statute, and no further. It did not address the general postconviction statute (indeed, it identified the issue as "yet to [be]

decide[d]," *id.*); it did not address whether any particular claims at issue needed to be waived "knowingly and intelligently"; indeed, it did not even mention *Curtis*.

On the "issue-grounds" distinction, therefore, the Court of Special Appeals' opinion in this case stands alone.

In addition to lacking support in the statute and case law, the Court of Special Appeals' issue-grounds distinction would severely undermine the legislature's intent. The statutory waiver provision reflects the legislature's determination that certain constitutional rights that are essential to a fair trial—including the right to counsel—merit extra protection in postconviction proceedings. *See Curtis*, 284 Md. at 148, 150 n.7.[2] The Court of Special Appeals' new rule, however, would eliminate that protection for certain allegations of error, for no other reason than that they happen to implicate the same fundamental right as an allegation that has already been raised. That would be so regardless of how factually distinct the allegations of error may be, or how unlikely it was that the petitioner knew about the claim and therefore had a fair opportunity to raise it. To

[2] The State suggests that the legislature only intended to protect claims involving the complete *absence* of counsel, not mere ineffective assistance of counsel. *See* State's Reply at 42–43, n.7. But parsing a petitioner's Sixth Amendment rights in that way is directly contrary to *Curtis*, where the Court held that the petitioner's claim of *ineffective assistance* of trial counsel—not the absence of trial counsel altogether—is subject to the statutory intelligent-and-knowing waiver standard. *See Curtis*, 284 Md. at 150 ("The question of the constitutional adequacy of trial counsel's representation is governed by the Johnson v. Zerbst standard of an 'intelligent and knowing' waiver."). It also makes no sense. There is only one Sixth Amendment right to counsel. *Cirincione*, 119 Md. App. at 484 ("The right to counsel is the right to effective assistance of counsel." (internal citations omitted)). And when a postconviction allegation of error is premised on that right, the statutory waiver standard as interpreted in *Curtis* applies.

preserve the safeguard for fundamental rights that the legislature established and intended, the Court of Special Appeals' holding on this issue should be reversed.

B. The Postconviction Statute's Legislative History Does Not Undermine This Court's Interpretation Of The Statutory Waiver Standard In *Curtis*.

Largely abandoning the Court of Special Appeals' issue-grounds distinction, the State argues that a straightforward application of this Court's statutory interpretation in *Curtis* is no longer appropriate in light of amendments to the postconviction statute. *See* State's Reply at 40, 45–47. But those amendments do not suggest that a new interpretation of the statutory waiver provisions is necessary. Nor would applying the statutory waiver standard to Syed's cell-tower claim run afoul of the legislature's concern with finality.

Nothing in the 1986 and 1995 amendments or the accompanying legislative history suggests that the legislature intended to dilute the statutory waiver provision in Section 7-106(b) by excluding certain claims implicating fundamental rights. Those amendments certainly show that the legislature was concerned with finality in postconviction proceedings. But the legislature chose to address that concern through a specific mechanism: limiting the number of petitions that a petitioner may file as of right, ultimately allowing only one petition that may be re-opened "in the interests of justice." *See* E000071–71; *Alston v. State*, 425 Md. 326, 336 (2012) (noting that legislature sought to eliminate "routine second petitions") (quoting the executive-branch official who drafted the 1995 amendment). There is no indication that the legislature also intended to adopt a more restrictive concept of waiver *when a petition is re-opened*. To the contrary,

in fact: The legislature left the statutory waiver provision interpreted in *Curtis* unchanged in pertinent part, implying that the legislature intended to preserve this extra protection for claims affecting fundamental rights. *See Stachowski v. State*, 416 Md. 276, 291 (2010) ("The General Assembly is presumed to be aware of [the Court of Appeals'] interpretation of its enactments.").

Nor would applying the rigorous statutory waiver standard to Syed's cell-tower claim undermine the new one-petition regime. The legislature expressly contemplated that some petitions may be re-opened "in the interests of justice," Md. Code Ann., Crim. P. § 7-104, and that in those circumstances the court may address new claims that have not been waived, *id.* § 7-106(b). That is all the Circuit Court did here.

Further, contrary to the State's dire prediction, requiring intelligent-and-knowing waiver of allegations of error like Syed's will not effectively allow for unlimited subsequent petitions. The legislature imposed two other restrictions on subsequent proceedings that adequately protect against unwarranted delays.

First, the legislature designated the circuit court as a gatekeeper, allowing a petition to be re-opened *only* if a circuit court finds, in its broad discretion, that doing so would be "in the interests of justice." *Id.* § 7-104; *see also Gray v. State*, 388 Md. 366, 383–384 (2005) (decision to re-open may only be reversed if it is "beyond the fringe of what [the reviewing] court deems minimally acceptable"). This standard empowers the court to quickly and decisively close the door on frivolous claims or add-ons. *See, e.g.*, *Gray*, 388 Md. at 369 (affirming a one-page order denying reopening, and holding that a

circuit court is not "required to provide a detailed supporting statement or memorandum when ruling upon a petition to reopen a postconviction proceeding").

Second, even if the circuit court finds that a meritorious new claim would otherwise warrant reopening, the petitioner must overcome a presumption that the petitioner waived the claim by intelligently and knowingly failing to raise it previously. Md. Code Ann., Crim. P. § 7-106(b). The State suggests that this presumption could be easily rebutted, because there may be no on-the-record colloquy in postconviction proceedings to assess whether petitioner is deliberately waiving a claim that has not been raised. *See* State's Reply at 40, 42–43. But an in-court colloquy is not the only way to determine whether petitioner's waiver was knowing and intelligent. Another way is to examine the circumstances and record evidence, as the Circuit Court did here. *See Syed,* 2016 WL 10678434, at *18–19; *see also Curtis*, 284 Md. at 143 (instructing postconviction courts to look to the "particular facts and circumstances surrounding [the] case" to assess waiver); *id* at 135–136, 151 (finding waiver was not intelligent and knowing based on evidence other than an in-court colloquy, including the fact that the petitioner's counsel never advised him that he could raise the ineffective-assistance claims at issue). If the petitioner cannot point to some record evidence that his waiver was uninformed, the presumption controls. *See, e.g.*, *Harris v. State*, 160 Md. App. 78, 93 (2004) (noting circuit court finding of waiver where petitioner "had done little or nothing to rebut the presumption that he had waived" allegations of error premised on fundamental rights (internal quotation marks omitted)); *McElroy v. State*, 329 Md. 136, 146–147 (1993) (finding claim implicating fundamental right to jury trial had been

waived because petitioner offered no evidence to rebut the presumption of knowing and intelligent waiver).

As the Circuit Court found, Syed has cleared both of these hurdles here. *See* E000049–55 (describing and affirming Circuit Court's conclusion that re-opening postconviction proceedings to address Syed's cell-tower claim was in the interests of justice); *Syed,* 2016 WL 10678434, at *18–19 (finding cell-tower claim was not intelligently and knowingly waived). Considering Syed's cell-tower claim on the merits therefore would not open the floodgates to endless postconviction proceedings in other cases.

C. *Curtis* Cannot Be Distinguished On Its Facts.

The State's remaining attempts to distinguish *Curtis* on its facts are likewise unavailing. *See* State's Reply at 38–39, 40–41. This Court's statutory interpretation in *Curtis*—that the heightened waiver standard applies to allegations of error implicating fundamental rights—did not depend on the particular facts of that case. It was grounded in the observation that the legislature intended to incorporate the waiver standard from existing common-law practice, which required intelligent and knowing waiver of fundamental rights, including the right to counsel. The scope and meaning of that statutory waiver standard do not change from fact to fact or case to case.

In any event, the State's factual distinctions are immaterial. The State first points out that in *Curtis*, the petitioner had alleged ineffective assistance of not only trial counsel, but also appellate and postconviction counsel. State's Reply at 38–39. But the threshold question whether the statutory waiver standard applies to a particular allegation

of error depends on whether the allegation is premised on a fundamental right, not on how many lawyers the allegation is lodged against. *See Curtis*, 284 Md. at 148, 150 n.7. And as this Court made clear in *Curtis*, one such right is the right to effective assistance of trial counsel. *Id.* at 150–151. Thus, the petitioner's ineffective assistance of trial counsel claim in *Curtis*, like Syed's claim here, triggered the statutory waiver standard regardless of whether subsequent counsel was also deficient.

The State also argues that Syed was more intelligent and involved in his case than the petitioner in *Curtis*. State's Reply at 40–41. Again, those circumstances do not bear on the question of whether the statutory waiver standard *applies*. If anything, they are relevant to the factual question whether Syed knowingly and intelligently waived his cell-tower claim. The Circuit Court made a factual finding to the contrary. *Syed,* 2016 WL 10678434, at *18–19. The Court of Special Appeals never reached that issue, because it wrongly concluded that the intelligent-and-knowing waiver standard did not apply. This Court therefore should not address it in the first instance. In any event, the Circuit Court's factual finding that Syed did not intelligently and knowingly waive his cell-tower claim was not clearly erroneous, *see* Br. of Appellee, *State v. Syed*, No. 1396, at 23–25 (Md. Ct. Spec. App., Mar. 29, 2017), and therefore should not be disturbed, *see Holmes v. State*, 401 Md. 429, 472 (2007).

There is thus no basis for applying a different interpretation of the statutory waiver standard to Syed's cell-tower claim than this Court applied to the ineffective assistance of trial counsel claim in *Curtis*.

D. The Merits Of Syed's Cell-tower Claim Should Not Be Considered Here, But Would Warrant Relief In The Court of Special Appeals.

The State ends its brief by tersely suggesting that Syed's cell-tower claim lacks merit in any event. State's Reply at 47–48. This argument is both procedurally improper and incorrect. The Court of Special Appeals never reached the merits of Syed's cell-tower claim, and the questions this Court took up on certiorari do not encompass the merits of this claim.[3] Thus, the proper result is to reverse the finding of waiver and remand to the Court of Special Appeals for consideration of the merits. *See* Md. Rule 8-131(b)(1) ("[T]he Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals."). Of course, should this Court agree with the Court of Special Appeals that Syed is entitled to a new trial based on his alibi claim, neither it nor the Court of Special Appeals would need to reach the merits of the cell-tower claim.

In any event, the State is incorrect in asserting that the cell-tower claim lacks merit. The only court to address the merits of this claim—the Circuit Court—granted Syed a new trial on that very basis. With good reason: trial counsel had in her possession, but failed to use, a disclaimer on cellular phone records that specifically warned that incoming calls were not reliable evidence of location. *See* E001355 (AT&T Fax Cover Sheet). Yet, that is precisely how the State and its expert used those calls at trial. No post-hoc dispute among experts today can absolve trial counsel's failure to even *ask* the

[3] *See* Maryland Court of Appeals, *Petition for Writ of Certiorari – July 2018*, https://www.courts.state.md.us/coappeals/petitions/201807petitions (framing the cell-tower question on appeal in terms of waiver only) (last visited Nov. 14, 2018).

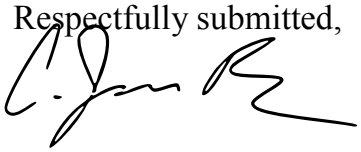
State's expert about the disclaimer during cross-examination. *See Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) ("[A]ny reasonable attorney . . . would study the state's laboratory report with sufficient care so that if the prosecution advanced a theory at trial that was at odds with the [ ]evidence, the defense would be in a position to expose it on cross-examination").[4] The prejudice to Syed from trial counsel's error also is clear. The State's expert at trial testified on a subject that the Circuit Court found to be the "crux of the State's case." *Syed,* 2016 WL 10678434, at *24. But the same State's expert has now sworn that, had he been aware of the "critical information" in the disclaimer, he would not have testified the way he did without investigating further. E001363 ¶ 8 (Waranowitz Aff.).

CONCLUSION

For the foregoing reasons, and those in Syed's initial brief, the Court of Special Appeals' decision to grant Syed a new trial should be affirmed.

[4] The Circuit Court also determined that the State's expert at the postconviction hearing was not credible, *Syed,* 2016 WL 10678434, at *26–27, and that the primary case on which the State relied was distinguishable, *see id.* at *23 (distinguishing *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015), which involved the subsequent rejection of then-uncontroversial scientific evidence, not evidence available to defense counsel at the time of trial).

Respectfully submitted,



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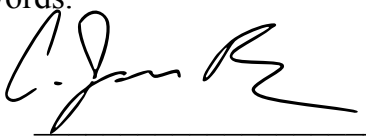
CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH MARYLAND RULES

Pursuant to Maryland Rule 8-504(a)(9), Respondent states that this brief was prepared in Times New Roman 13-point font. Further, this brief complies with the font, margin, and line spacing requirements of Maryland Rule 8-112; and the Reply Brief of Respondent/Cross-Petitioner contains 4,029 words.



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PERTINENT PROVISIONS

Md. Code Ann., Crim. Proc. § 7-104

The court may reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice.

Md. Code Ann., Crim. Proc. § 7-106(a)

Allegations of error fully litigated

(a) For the purposes of this title, an allegation of error is finally litigated when:
(1) an appellate court of the State decides on the merits of the allegation:
(i) on direct appeal; or
(ii) on any consideration of an application for leave to appeal filed under § 7-109 of this subtitle; or
(2) a court of original jurisdiction, after a full and fair hearing, decides on the merits of the allegation in a petition for a writ of habeas corpus or a writ of error coram nobis, unless the decision on the merits of the petition is clearly erroneous.

Md. Code Ann., Crim. Proc. § 7-106(b)(1)(i)

Waiver of allegation of error

(b)(1)(i) Except as provided in subparagraph (ii) of this paragraph, an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation:
1. before trial;
2. at trial;
3. on direct appeal, whether or not the petitioner took an appeal;
4. in an application for leave to appeal a conviction based on a guilty plea;
5. in a habeas corpus or coram nobis proceeding began by the petitioner;
6. in a prior petition under this subtitle; or
7. in any other proceeding that the petitioner began.

Md. Rule 8-131(b)(1)

(b) In Court of Appeals--Additional Limitations.
(1) *Prior Appellate Decision.* Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in

a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were delivered by first-class mail, postage prepaid, this 19th day of November, 2018 to:

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