

STATE OF LOUISIANA
9th JUDICIAL DISTRICT COURT
PARISH OF RAPIDES

STATE EX REL.
DARRELL J. ROBINSON,

Petitioner

VERSUS

DARREL VANNOY, Warden,
Louisiana State Penitentiary,
Angola, Louisiana,

Respondent

FILED & RECORDED
ROBIN L. HOOTER
CLERK OF COURT

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BY: *[Signature]*
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RAPIDES PARISH L.A.

No. Case No. 24-
Division "E"
DEATH CASE

PETITIONER'S MOTION TO SET DEADLINES

Petitioner Darrell James Robinson respectfully submits this *Motion to Set Deadlines* for the State's responses to Petitioner's discovery.

INTRODUCTION

On May 18, 2016, this Court ordered the State to respond to discovery propounded by Petitioner, including depositions, Requests for Admissions, and Interrogatories. On June 10, 2016, this Court ordered the State to respond to a Subpoena Duces Tecum prepared by Petitioner, which requires the State to provide an updated copy of its file in this matter, as well as other documents and materials.

On June 14, 2016, the State filed a writ with the Louisiana Supreme Court, which presented the following issues: (1) whether this Court erred in not continuing the evidentiary hearing that had been scheduled for July; (2) whether this Court erred in ordering the State to respond to Requests for Admission and Interrogatories propounded by Petitioner; and (3) whether this Court erred in ordering the depositions of multiple witnesses, including current and former State employees, without complying with Louisiana Code of Evidence 507.

On June 17, 2016 the State filed a second writ with the Louisiana Supreme Court, which presented the following issues: (1) whether this Court erred in ordering the State to respond to Petitioner's Subpoena Duces Tecum; (2) whether this Court erred in ordering that Petitioner could use special process servers in this case; and (3) whether this Court erred in denying the

State's *Motion to Quash Subpoena* of an attorney without a hearing (referring to Petitioner's Subpoena Duces Tecum – not the deposition subpoenas.)

On June 20, 2016, the Louisiana Supreme Court resolved both of the State's writs with one order. It granted the State's request for a continuance, and it ordered that this Court reconsider whether the depositions sought by Petitioner conform to Article 507. The Louisiana Supreme Court did not grant relief on the other issues raised by the State's writs. Instead, it rejected the State's appeal of this Court's orders requiring that the State respond to Petitioner's Requests for Admission, Interrogatories, and Subpoena Duces Tecum. In fact, the Louisiana Supreme Court's Order makes clear that the Court expects the State will respond to this discovery: "... the trial court is directed to afford the State additional time to respond to discovery, prepare for depositions" See Per Curiam Order (La., June 20, 2016) (emphasis added)). Thus, the orders for written discovery remain in effect.

This Court's May 18 Order gave the State until May 23, 2016 to object to Petitioner's discovery. The State did not timely object within this time period. At the June 2, 2016 hearing, the Court extended the timeline for the State to object to Petitioner's written discovery to June 10, 2016, based on the State's representation that it could respond by that time. See June 2, 2016 Hearing Transcript at 23:31-24:1 ("I will attempt to have something in writing by next Friday, whether it's answers or objections [to the written discovery].") The State did not timely object within that extended time period. On June 20, the State nonetheless represented it would "file appropriate written objections shortly." June 20, 2016, email from Hugo Holland to Judge Patricia Koch. A month has passed since Mr. Holland's email, and no objections have been filed or served.

Two months have passed since Petitioner's Requests for Admission and Interrogatories were served. Six weeks have passed since Petitioner's Subpoena Duces Tecum was served. The State has completely failed to respond, either by answering the discovery or serving written objections. Petitioner brings this Motion to Set Deadlines to end the delay.

ARGUMENT

I. THE LOUISIANA SUPREME COURT RATIFIED PETITIONER'S WRITTEN DISCOVERY, AND THE STATE HAS WAIVED ITS OBJECTIONS.

This Court's orders authorizing Petitioner's Requests for Admission, Interrogatories, and Subpoena Duces Tecum are in effect and have been ratified by the Louisiana Supreme Court. The State has failed to respond in any way to this discovery, either through written objections or answers, despite the multiple extensions afforded by the Court. Further, the State has failed to comply with the timelines set forth in the Louisiana Code of Civil Procedure, which guides discovery in post-conviction proceedings. *See* La. C.Cr.P. art. 929(B). Article 1458 of the Code provides that the State may serve its written answers or objections to interrogatories within 30 days. Article 1467 provides that a request for admission is deemed admitted unless the party to whom the request is directed serves written answers or objections within 15 days of being served with the request. By any measure, objections to Petitioner's written discovery are untimely and have been waived.¹

II. ARTICLE 507 DOES NOT APPLY HERE, BUT EVEN IF IT DID, PETITIONER'S DEPOSITION REQUESTS SATISFY IT.

Louisiana Code of Evidence Article 507 sets forth several requirements should a party wish to subpoena a lawyer to "reveal information about a client or former client." It provides:

A. General rule. Neither a subpoena nor a court order shall be issued to a lawyer or his representative to appear or testify in any criminal investigation or proceeding where the purpose of the subpoena or order is to ask the lawyer or his representative to reveal information about a client or former client obtained in the course of representing the client unless the court after a contradictory hearing has determined that the information sought is not protected from disclosure by any applicable privilege or work product rule; and all of the following:

¹ Petitioner notes that Louisiana Code of Civil Procedure Article 1472 provides:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Article 1466, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

The State's failure to timely answer or object to the Requests for Admission implicate this provision. Moreover, this provision will be implicated if the State serves untimely denials of the requested admissions and Petitioner later proves those facts at a hearing. Petitioner reserves his right to bring an action for fees under this provision.

- (1) The information sought is essential to the successful completion of an ongoing investigation, prosecution, or defense.
- (2) The purpose of seeking the information is not to harass the attorney or his client.
- (3) With respect to a subpoena, the subpoena lists the information sought with particularity, is reasonably limited as to subject matter and period of time, and gives timely notice.
- (4) There is no practicable alternative means of obtaining the information.

Article 507 does not apply here. First, Petitioner does not seek information “about a client or former client.” Second, the information Petitioner does seek is not privileged, and even if it was the State has waived any such claim by failing to raise a single claim despite producing tens-of-thousands of pages of documents to Petitioner. Third, Petitioner has subpoenaed several non-lawyer members of law enforcement in addition to Rapides Parish ADA Michael Shannon. Those non-lawyer members of law enforcement are not protected by Article 507. Finally, even if Article 507 did apply, Petitioner has satisfied the four-part test it contains.

A. Petitioner Does Not Seek Information “About a Client.”

Article 507 does not apply to the depositions Petitioner seeks because, as this Court explained in its June 3, 2016 Order, Petitioner does not seek “information about a client or former client obtained in the course of representing the client.” Reasons & Order at 1, filed June 3, 2016; *see also* ABA Standards for Criminal Justice: Prosecutorial Investigations (approved February 2008) (“The prosecutor’s client is the public, not particular government agencies or victims.”); National District Attorneys’ Association National Prosecution Standards at 22 (3d ed.) (explaining that “law enforcement agencies or individual law enforcement officers are not clients in criminal cases”).

There are two primary areas of inquiry for the proposed depositions, as spelled out in Petitioner’s May 16 Motion for Discovery. The first area of inquiry is the investigation and prosecution of Petitioner in the case of *State v. Darrell James Robinson*. This information is properly within the purview of post-conviction discovery. For example, Louisiana’s Public Records law specifically contemplates production of law enforcement and DA files in post-conviction. *See, e.g., State v. Chapman*, 699 So.2d 504, 507 (La. 1997) (holding that “the district attorney’s files and supplemental police report are public and subject to disclosure in a claim for postconviction relief”); *Innocence Project New Orleans v. New Orleans Police Dep’t*, 129 So. 3d

668, 676 (La. Ct. App. 2013) (affirming judgment awarding sanctions and attorneys fees where police department ignored plaintiff's post-conviction Public Records Act request).

Notably, the cover letter for the State's initial production of the prosecution file in 2008 indicates that the State was producing approximately 21,000 pages of documents. However, only approximately 18,000 pages of documents were actually produced. Recently, the State indicated that the file consists of 25,000+ pages. There is no doubt that a significant portion of the DA's file has not been produced to Petitioner. Petitioner has a right to ask about these materials, what they contain, and why they have not been produced. *E.g.*, La. R.S. 44:31 B(3) ("The burden of proving that a public record is *not* subject to inspection, copying, or reproduction shall rest with the custodian.").

The other primary area of Petitioner's inquiry relates to the apparent removal of *Brady* material that was provided to post-conviction counsel by the DA's office, but which is now missing from the DA's file, as well as the apparent continued suppression of *Brady* information that should have been disclosed to Petitioner twenty years ago. This has nothing to do with a "client" but rather the State's failure to abide by the Constitution. Article 507 does not protect against inquiry on this topic.

B. The State Waived Privilege.

The Rapides Parish District Attorney has already produced much of its file to Petitioner in post-conviction, as have the North Louisiana Criminalistics Laboratory (NLCL), the Rapides Parish Sheriff's Office, and a number of other state agencies. To the extent any privilege or protection ever covered these documents or the subject matter of these documents, that privilege and protection have been waived. Further, as La. C.Cr.P. art. 723(B) sets forth, *Brady* materials are not covered by the protection or privilege, and discovery regarding those materials does not invade the privilege.

The burden of demonstrating whether information is privileged is placed on the holder of the privilege. *Hodges, Grant & Kaufman v. United States*, 768 F.2d 719, 721 (5th Cir. 1985). As a threshold matter, the State has failed to even address this issue, let alone satisfy its burden of demonstrating that the information Petitioner seeks is privileged or protected and thus falls within the scope of Article 507. *See, e.g., United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir. 1982) ("We believe that El Paso may not withdraw behind the shield of the attorney-client privilege for an additional reason. El Paso failed to particularize its assertion of the privilege and

prove its case with respect to any specific document. El Paso made only a blanket assertion of the privilege as to all documents . . . Such a showing is simply inadequate.”) (emphasis added).

Regardless, it is blackletter law that the “disclosure of any significant portion of a confidential communication waives the privilege as to the whole.” *Nguyen v. Excel Corp.*, 197 F.3d 200, 208 (5th Cir.1999). Similarly, “the voluntary disclosure of attorney work product to an adversary or a conduit to an adversary waives work-product protection for that material.” *Baricuatro v. Indus. Pers. & Mgmt. Servs., Inc.*, No. Civ. A. 11-2777, 2013 WL 3367137, at *4 (E.D. La. July 5, 2013); *see also Stanley v. Trinchara*, No. CIV.A. 02-1235, 2005 WL 399460, at *3 (E.D. La. Feb. 16, 2005) (“The essential question is whether the work product was kept away from adversaries.”) Waiver of an attorney-client communication waives the privilege as to all other communications relating to the same subject matter. *Southern Scrap Material Co. v. Fleming*, 2003 WL 21474516, *7 (W.D.La. June 18, 2003).

Moreover, even if certain documents or communications are covered by the privilege, the facts contained in those documents are not privileged. *El Paso Co.*, 682 F.2d at 538-39 n. 10 (explaining that the attorney-client privilege “does not protect against discovery of underlying facts from their source merely because those facts have been communicated to an attorney.”).

The State has disclosed literally tens-of-thousands of pages of material without a single accompanying claim of privilege or protection. This wholesale voluntary production of documents obliterated the privilege and work product protection with regard to the State’s investigation and prosecution of Petitioner. Further, the parties jointly filed numerous internal communications between prosecutors, probation, and other state actors, as exhibits to the parties’ Joint Stipulation of Facts. The State cannot now argue that those communications or their subject matter are privileged, and the State cannot avail itself of Article 507 to avoid depositions on those topics.

Finally, exculpatory and impeachment evidence is not covered by the protection or privilege, and documents, communications, and information about the destruction or suppression of *Brady* material fall within the crime-fraud exception to the privilege. La. C.Cr.P. art. 723(B); *Clark v. State*, 261 S.W.2d 339, 347 (1953) (communication between lawyer and client regarding destruction of evidence in murder case fell within crime-fraud exception); *see also* La. C.E. art. 506(C)(1)(a) & (C)(1)(b).

C. Article 507 Does Not Apply to the Proposed Non-Lawyer Deponents.

The State appears to object not just to the deposition of ADA Michael Shannon, but also the depositions of various law enforcement personnel involved with the investigation and prosecution of Petitioner, including Ray Delcomyn, Anthony Ribaud, Claude Weatherford, and T.J. Shuflin (collectively, the “Law Enforcement Witnesses”). By definition, Article 507 applies only to “an attorney or his representative.” The Law Enforcement Witnesses are not attorneys, nor do they represent attorneys. Article 507 does not protect them.

The State’s argument, if taken to its logical conclusion, would require that defendants conduct an Article 507 hearing any time they intended to call a member of law enforcement, or a crime lab employee, during any stage of a criminal case. That result does not comport with the plain language of Article 507 or the legislative intent behind it.

The Legislative Comment promulgated in connection with Article 507 confirms that the legislature originally intended that it would apply only when prosecutors subpoenaed defense attorneys:

This Article is intended to strike a balance between the attorney-client privilege and the need of the prosecution to obtain otherwise unprivileged information about a client from his attorney or former attorney. It is designed to provide breathing room for the privilege by setting forth appropriate procedural steps when the state seeks to subpoena a lawyer for the purpose of obtaining information about a client or former client. Such measures have been adopted as the official policy of the American Bar Association.

Legislative Comment, La. Prac. Evidence Art. 507 (2016 ed.) (emphasis added). Article 507 was amended in 2007 to include prosecutors among the lawyers protected. Nonetheless, even the amended Article 507 omits any mention of non-lawyers.

The plain language of Article 507, the express legislative intent behind Article 507, and the common sense application of Article 507, establish that it does not cover non-lawyers. Article 507 does not apply to the Law Enforcement Witnesses, and their depositions should be scheduled during the July 26, 2016 hearing.

D. Petitioner’s Deposition Requests Satisfy Article 507.

Even if Article 507 did apply to Mr. Shannon or the Law Enforcement Witnesses, Petitioner has made the required showing for the requested depositions. The Court should require that the parties set a schedule for those depositions during the July 26 hearing.

1. Michael Shannon

- a. The information sought is essential to the successful completion of an ongoing investigation, prosecution, or defense.

Mr. Shannon is expected to be one of the State's primary witnesses in this case. Indeed, during the May 9, 2016 hearing in this matter, Mr. Shannon pleaded at length for the opportunity to explain his actions during Petitioner's prosecution. Prior to that date, the State had removed Mr. Shannon from an active role in these post-conviction proceedings because he was likely to be a witness in the case, and as recently as June 2, 2016, the DA's office was telling reporters that Mr. Shannon will "most likely be a witness" during the post-conviction hearings. (*See Ex. A.*) The parties' Joint Stipulation of Facts even refers to Mr. Shannon's anticipated testimony.

The State cannot have it both ways. It cannot plan to call Mr. Shannon as a witness at the evidentiary hearing but at the same time claim he should be unavailable for a deposition. To do so would be to use the privilege, and Article 507, as a sword and a shield, something which the rules of discovery forbid. *E.g., Nguyen v. Excel Corp.*, 197 F.3d 200, 207, n. 10 (5th Cir. 1999) (explaining that a party may not "employ the privilege as both a sword and a shield," and that "[a]ttempts at such improper dual usage of the privilege result in a waiver by implication").

Further, the information sought through Mr. Shannon's deposition is critical to Petitioner's claims. Mr. Shannon has unique knowledge about the *Brady* violations already identified in this case, as well as knowledge about additional undisclosed exculpatory and impeachment material. As just one example, the Lafayette District Attorney's Office has provided Petitioner with documents reflecting numerous oral communications between Mr. Shannon and Lafayette Assistant District Attorney Luke Edwards, shortly after Petitioner's trial, which culminate with the Lafayette DA's dismissal of felony charges against Leroy Goodspeed. (*See* Joint Stipulation ¶¶ (g) – (u).) Mr. Shannon is uniquely positioned to know the circumstances and content of these communications.

Finally, Mr. Shannon participated in drafting the Joint Stipulation between the parties. Given his status as a fact witness, Mr. Shannon essentially entered unsworn testimony about the Joint Stipulation into the record during the parties' May 9, 2016 hearing: "I've read the final stipulations And I am in basic agreement with all of it and the changes that have been made." (May 9, 2016 Hearing Transcript 5:25-6:4.) By making broad representations to the Court regarding the facts of this case, Mr. Shannon has opened the door to further inquiry.

- b. The purpose of seeking the information is not to harass the attorney or his client.

The purpose of Mr. Shannon's deposition is merely to clarify and reduce the number of facts at issue that will need to be resolved during the evidentiary hearing, so that the hearing can proceed as expeditiously and efficiently as possible. For example, the State has suggested it will make at least some privilege objections if Mr. Shannon testifies. The Court and the parties will benefit from cataloguing these objections during a deposition so that they can be litigated before the evidentiary hearing. Petitioner notes that he originally asked for, and was granted, depositions of 14 current and former state employees. At the Court's request, Petitioner's counsel reduced that request to the five most critical individuals as a show of good faith.

Petitioner has not dragged Mr. Shannon into these proceedings. Rather, Mr. Shannon interjected himself into these proceedings during the May 9 hearing, when he pleaded with the Court for the opportunity to "explain" the *Brady* violations revealed by Petitioner's post-conviction investigation. Similarly, the State has stated it intends to call Mr. Shannon as a witness. Petitioner seeks not to harass Mr. Shannon, but merely to get at the facts, and the State and Mr. Shannon himself have placed Mr. Shannon at the center of this inquiry.

- c. With respect to a subpoena, the subpoena lists the information sought with particularity, is reasonably limited as to subject matter and period of time, and gives timely notice.

Petitioner's deposition request, as detailed in his May 16, 2016 Motion for Discovery, specifies both the subject matter and the timeline of the deposition. Namely, Petitioner seeks information regarding the State's investigation and prosecution of Petitioner from 1996-2001, as well as information about how the DA's file in the case has been maintained since trial, and the circumstances surrounding the disappearance of several important documents from that file. This inquiry is reasonably limited and particular in scope, and it comports with Article 507.

- d. There is no practicable alternative means of obtaining the information.

Mr. Shannon knows information about Petitioner's trial, and the investigation of Petitioner's case, that cannot be found anywhere else. Mr. Shannon was the hub of the investigation and prosecution of Petitioner. All its spokes – the interviews of witnesses, the cultivation of Leroy Goodspeed and dismissal of felony charges against him, the analysis of forensic evidence – connect directly to Mr. Shannon. Other witnesses simply cannot provide the context and background for many documents that Petitioner plans to introduce at the hearing, nor

could they testify regarding oral communications involving Mr. Shannon that are relevant to Petitioner's claims.

2. The Law Enforcement Witnesses

- a. The information sought is essential to the successful completion of an ongoing investigation, prosecution, or defense.

Like Mr. Shannon, the Law Enforcement Witnesses (Raymond Delcomyn, Anthony Ribaud, Claude Weatherford, and T.J. Shufin) have unique knowledge about this case. Their testimony will be an essential component of the upcoming *Brady* hearing. For example, the State has produced jail records indicating that Mr. Delcomyn visited Leroy Goodspeed at the Lafayette Parish jail shortly before Petitioner's trial. Mr. Delcomyn has unique knowledge about the nature and subject-matter of that conversation, which appears relevant to Petitioner's *Brady* claims. Similarly, the State has produced notes of meetings between Mr. Shufin, other NLCL employees, and the prosecutors in Petitioner's case. Given the significant undisclosed forensic evidence in Petitioner's case, the nature and subject-matter of those meetings is material.

The State successfully fought for (and received) the opportunity to hold an evidentiary hearing on Petitioner's *Brady* claims. The State's position on the proposed depositions begs the question: who does the State expect will testify at the hearing it demanded? The most logical witnesses include those individuals with knowledge of the investigation and prosecution of Petitioner – namely, the Law Enforcement Witnesses. They know what happened. To get the full set of facts regarding the investigation and prosecution of Petitioner, their testimony must be heard. It would make no sense to hold the hearing without them. And if they are to appear at the hearing, then for the sake of efficiency, they should be deposed first.

- b. The purpose of seeking the information is not to harass the attorney or his client.

Again, as with Mr. Shannon, the purpose is not to harass, but rather to sharpen the issues of fact that must be resolved at the hearing. The ordered depositions will help achieve a more focused and efficient hearing.

- c. With respect to a subpoena, the subpoena lists the information sought with particularity, is reasonably limited as to subject matter and period of time, and gives timely notice.

Petitioner's Motion for Discovery laid out the scope of the information Petitioner seeks from the Law Enforcement witnesses. In short, Petitioner seeks information about the investigation and prosecution of Petitioner that took place from 1996-2001, as well as any

relevant information about how files were and have been kept, and the removal of any materials from the DA's file. The information sought is particularized and limited in both time and scope.

- d. There is no practicable alternative means of obtaining the information.

The Law Enforcement Witnesses have unique knowledge about the case. They were privy to meetings, conversations, and other communications about the undisclosed exculpatory and impeachment evidence Petitioner has uncovered. Many documents provided to Petitioner by the State were drafted by one of the Law Enforcement Witnesses, or refer to the investigative activities of the Law Enforcement witnesses. As such, the Law Enforcement Witnesses are uniquely suited to explain those documents and put them into context.

III. THE COURT SHOULD SET DEADLINES FOR THE STATE'S DISCOVERY RESPONSES AND HOLD THE STATE TO THOSE DEADLINES.

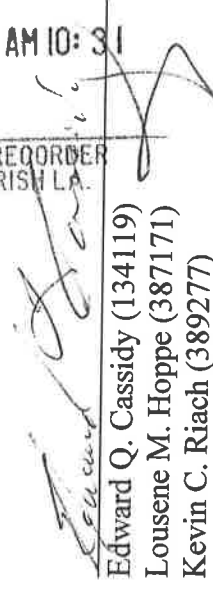
Petitioner respectfully requests that the Court, at the hearing on July 26, 2016, set dates for the State to respond to Petitioner's discovery, including Petitioner's Request for Admissions, Interrogatories, and Subpoena Duces Tecum, as well as dates for taking the depositions of T.J. Shufflin, Ray Delcomyn, Anthony Ribaud, Claude Weatherford, and Michael Shannon.

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests that the Court grant his Motion to Set Deadlines.

Dated: July 19, 2016

Respectfully submitted:



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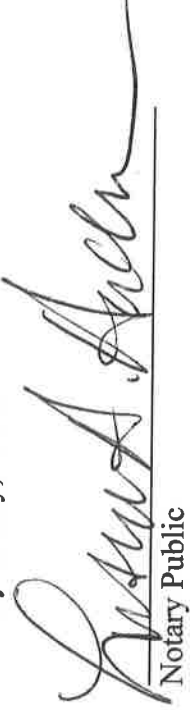
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BY _____
CLERK & RECORDER
RAPIDES PARISH LA.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email, facsimile and U.S. mail to the Rapides Parish Office of the District Attorney, Mr. Greg Gravel, Assistant District Attorney, and Hugo A. Holland, Jr., Assistant District Attorney on this 19th day of July, 2016.


Edward Q. Cassidy

Subscribed and sworn to before me this
19th day of July, 2016.


Notary Public



STATE OF LOUISIANA
9th JUDICIAL DISTRICT COURT
PARISH OF RAPIDES

STATE EX REL.
DARRELL J. ROBINSON,

Petitioner

VERSUS

DARREL VANNOY, Warden,
Louisiana State Penitentiary,
Angola, Louisiana,

Respondent

No. Case No. 243-583
Division "E"
DEATH CASE

ORDER

CONSIDERING THE FOREGOING *Motion to Set Deadlines*, IT IS ORDERED that the

State of Louisiana show cause, if it can, on the 26th day of July, 2016, at 1:30 p.m., why this

Court should not:

1. Set deadlines for the State of Louisiana's responses to Petitioner's written discovery, subpoena duces tecum to the Rapides Parish District Attorney's Office, and depositions.

Signed this 21st day of July, 2016, in Alexandria, Louisiana.

BY 
HON. PATRICIA KOCH
CLERK & RECORDER
RAPIDES PARISH LA.

FILED & RECORDED
ROBIN L. HOOTER
CLERK OF COURT

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