

NORTH CAROLINA COURT OF APPEALS

)	
STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Alamance</u>
)	
TAMORA WILLIAMS)	
)	

DEFENDANT-APPELLANT'S BRIEF

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TAMORA WILLIAMS)	
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DEFENDANT-APPELLANT'S BRIEF

ISSUE PRESENTED

- I. DID THE TRIAL COURT ERR IN ORDERING MS. WILLIAMS TO PAY \$27,704.85 IN RESTITUTION TO MR. FOGLEMAN?

STATEMENT OF THE CASE

On February 26, 2018, Tamora Williams appeared in Alamance County Superior Court before the Honorable James K. Roberson and entered an *Alford* plea to one count of embezzlement from her former employer, George Clifton Fogleman. (Rpp. 15-27) The terms of the plea agreement were as follows:

The Defendant will plead guilty to one count of embezzlement. All other charges will be dismissed. The State agrees to a probationary sentence to allow the Defendant to make restitution payments.

The State also agrees to have a hearing as to the amount of restitution. Defendant contends restitution has been paid in full; State agrees that once, either restitution is paid by probation or, if the Court concludes it has been paid, the Defendant will move to unsupervised. No other charges will come out of this investigation.

(Rp. 9)

Judge Roberson found there was a factual basis for the entry of the plea, accepted the plea, and continued the matter for a hearing on the issue of restitution. (Rp. 26)

On February 27, 2018, a hearing on the issue of restitution was held. At the conclusion of that hearing, the trial court took the matter under advisement. (Rp. 113)

On March 23, 2018, Judge Roberson issued a written order setting the amount of restitution owed by Ms. Williams to Mr. Fogleman at \$27,704.85. (Rp. 126)

On April 12, 2018, the parties appeared before Judge Roberson for the entry of judgment and sentencing. Judge Roberson sentenced Ms. Williams to a period of 6-17 months incarceration, suspended for a period of 36 months supervised probation, and ordered that Ms. Williams pay \$27,704.85 in restitution to Mr. Fogleman. (Rpp. 131-32, 138-41) Ms. Williams gave oral notice of appeal, and the Office of the Appellate Defender was appointed. (Rpp. 134, 142)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Ms. Williams appeals pursuant to N.C. R. App. P. 21 and N.C. Gen. Stat. § 15A-1444(e). Contemporaneously with this brief, Ms. Williams filed a petition seeking review by writ of certiorari of the April 12, 2018 order directing her to pay \$27,704.85 in restitution to Mr. Fogleman. (Rp. 126) The issues argued in the petition and fully contained in this brief are reviewable by writ of certiorari.

STATEMENT OF THE FACTS

On March 5, 2016, Tamora Williams was arrested for embezzling \$1,019.64 from her employer, George Clifton Fogleman. (Rpp. 2-3)

On May 25, 2016, Ms. Williams filed a civil complaint against Mr. Fogleman alleging slander and defamation. (Rp. 51) On August 10, 2016, Mr. Fogleman filed an answer and counterclaim alleging embezzlement and employee theft. (Rp. 124) Mr. Fogleman alleged that he had been damaged in excess of \$25,000.00. (Rpp. 118-121)

On February 13, 2017, the parties entered into a settlement agreement, mediated in Mr. Fogleman's attorney's office, wherein Ms. Williams agreed to pay Mr. Fogleman \$13,500.00. (Rpp. 53, 116-17, 125) That mediated settlement agreement contained the following release clause:

The parties hereby release and fully discharge each other of and from any and all claims, causes of actions, demands, and damages, known and unknown, asserted and unasserted, from the beginning of time to the date hereof, except as set forth herein.

(Rp. 116)

Ms. Williams paid Mr. Fogleman the \$13,500.00 settlement sum and on March 2, 2017, the parties executed a joint stipulation of

dismissal with prejudice. In the stipulation, the parties agreed that each party would bear its own court costs and attorney fees. (Rp. 122)

On February 26, 2018, Ms. Williams was charged by information with embezzlement. (Rpp. 4-5) That same day, Ms. Williams entered an *Alford* plea to embezzlement. (Rpp. 9, 15-27) The parties stipulated to the need for a hearing on the issue of restitution. (Rpp. 9, 21, 25-26)

At the February 27, 2018 restitution hearing, Mr. Fogleman contended that Ms. Williams had embezzled \$44,704.85 from him and that he was entitled to restitution in that amount. (Rp. 50) The defense contended that Ms. Williams did not owe any restitution because her settlement payment of \$13,500.00 to Mr. Fogleman in the civil action was payment in full for Mr. Fogleman's loss. (Rpp. 90, 104-09)

On March 23, 2018, Judge Roberson issued a written order with findings of fact and conclusions of law. He concluded that:

- (1) The Settlement Agreement entered in the civil action does not prohibit a court in the criminal action from determining the amount of restitution to be paid from the Defendant to the victim in that criminal action.
- (2) The Defendant is entitled to a credit against the gross amount of restitution imposed in the amount of \$13,500.00, the amount paid by the Defendant in connection with the Settlement Agreement in the civil action.

(Rp. 126)

Judge Roberson then determined that the gross amount of restitution Ms. Williams owed to Mr. Fogleman was \$41,204.85. Judge Roberson credited Ms. Williams with the \$13,500.00 she paid in the civil action, leaving the outstanding amount of restitution owed to be \$27,704.85. (Rpp. 126, 132, 140-41)

ARGUMENT

I. THE TRIAL COURT ERRED IN ORDERING MS. WILLIAMS TO PAY \$27,704.85 IN RESTITUTION TO MR. FOGLEMAN.

A. Introduction

In resolving the civil action concerning Ms. Williams' embezzlement from Mr. Fogleman, the parties entered into a binding settlement agreement containing a general release clause. The release clause discharged all claims between the parties and barred all subsequent rights to recover with respect to the offense. In consideration thereof, Ms. Williams paid Mr. Fogleman a settlement sum of \$13,500.00. Although the plain and ordinary meaning of the agreement establishes that it was a general release putting an end to all matters arising from the offense, Mr. Fogleman was later awarded \$27, 704.85 in restitution for the offense.

Mr. Fogleman was under no obligation to settle the civil lawsuit, sign a general release clause, or accept \$13,500.00 from Ms. Williams. But he did. And in doing so, he agreed to two things. First, he agreed that he was made whole for his loss by the \$13,500.00 payment from Ms. Williams. Second, he agreed to fully release and discharge Ms.

Williams from any subsequent monetary claims arising from her embezzlement from him. Accordingly, Mr. Fogleman could not then recover additional damages in the form of restitution in a criminal prosecution for that embezzlement, and the trial court erred in concluding otherwise.

B. Standard of review

A trial court's decision to award restitution is reviewed *de novo*. *State v. Hunt*, ____ N.C. App. ____, ____, 792 S.E.2d 552, 563 (2016). Under a *de novo* review, this Court considers the matter anew and substitutes its judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

C. Controlling authority regarding civil settlement agreements and criminal restitution

In civil law, a settlement agreement is an agreement ending a dispute or lawsuit. A general release "is a private agreement amongst parties which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised." *Financial Services of Raleigh, Inc., v. Barefoot*, 163 N.C. App.

387, 392, 594 S.E.2d 37, 41 (2004); *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E.2d 190, 195 (1975).

Our Supreme Court has described the effect of settlement agreement and release clause as follows:

A completed compromise and settlement fairly made between persons legally competent to contract and having the authority to do so with respect to the subject matter of the compromise, and supported by sufficient consideration, operates as a merger of, and bars all right to recover on, the claim or right of action included therein, as would a judgment duly entered on the action between said persons.

Jenkins v. Fields, 240 N.C. 776, 776, 83 S.E.2d 908, 908 (1954).

This Court defines the subject matter of the compromise as “the topic of dispute in the legal matter” and “the thing in which a right or duty has been asserted; the thing in dispute.” *Barefoot*, 163 N.C. App. at 392-93, 594 S.E.2d at 41.

In criminal law, restitution is governed by N.C. Gen. Stat. § 15A-1340.34(b) (2016). North Carolina permits a trial court to require a defendant to make restitution to the victim for any damages arising directly and proximately out of the offense committed by the defendant.

Id. The amount of restitution awarded must be supported by evidence adduced at the trial or sentencing. *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). When no evidence supports the award, the award of restitution will be vacated. *Moore*, 365 N.C. at 285, 715 S.E.2d at 849.

North Carolina law contemplates the intersection of these two areas of law in one manner: when criminal charges are brought and restitution is awarded prior to a civil suit for damages being pursued. N.C. Gen. Stat. § 15A-1340.37(a) (2016) addresses the effect of a prior criminal restitution order on a subsequent civil action for damages arising out of the same offense. Pursuant to § 15A-1340.37(a), an order providing for restitution in a criminal case does not abridge the victim's right to bring a civil action against the defendant for damages arising from the same offense. But, the statute provides that the civil judgment must be reduced by the amount paid by the defendant under the terms of the previous criminal restitution order. *Id.*

North Carolina law, however, has not addressed the converse situation, which is at issue herein: when a civil action is brought and settled and the parties execute a release clause releasing each other

from further recovery for damages, yet criminal restitution is later sought and ordered for the same offense. In the case at bar, Ms. Williams and Mr. Fogleman entered into a binding settlement agreement containing a general release clause. To resolve the civil matter, Ms. Williams paid Mr. Fogleman \$13,500.00 in damages arising from the offense. Yet, Ms. Williams was later required to pay restitution to Mr. Fogleman in a criminal action for the same offense. The resolution of this matter appears to be an issue of first impression in North Carolina.

D. The trial court erred in ordering Ms. Williams to pay Mr. Fogleman \$27,704.85 in criminal restitution because the settlement agreement entered into by the parties contained a binding release clause. Per the language of that binding release clause, Mr. Fogleman abandoned his claim against Ms. Williams in exchange for her payment to him of \$13,500.00.

In North Carolina, a comprehensively phrased general release clause discharges “all and sundry claims between the parties.” *McGladrey, Hendrickson & Pullen v. Syntek Finance Corporation*, 92 N.C. App. 708, 710-11, 375 S.E.2d 689, 691 (1989)(citing *Merrimon v. The Postal Telegraph-Cable Company*, 207 N.C. 101, 106, 176 S.E. 246, 248 (1934)). Moreover, a valid release clause acts as a bar to all

subsequent rights to recover on the subject matter of the claim. *Barefoot*, 163 N.C. App. at 392, 594 S.E.2d at 41.

Mr. Fogleman fired Ms. Williams because he believed she had embezzled money from him while working as his employee. Thereafter, when Ms. Williams learned that Mr. Fogleman was informing others that he believed she had embezzled from him, she filed a civil lawsuit alleging libel and slander. Mr. Fogleman counter-sued for embezzlement and employee theft. Both parties, represented by counsel, entered into mediation in the law office of Mr. Fogleman's attorney. They reached a settlement agreement resolving their claims of libel, slander, embezzlement, and employee theft. The settlement agreement contained a general release clause providing that:

The parties hereby release and fully discharge each other of and from any and all claims, causes of actions, demands, and damages, known and unknown, asserted and unasserted, from the beginning of time to the date hereof, except as set forth herein.

(Rp. 116)

In consideration thereof, Ms. Williams paid Mr. Fogleman \$13,500.00. (Rp. 117) By signing the release clause and accepting the monetary consideration, Mr. Fogleman abandoned his right to seek

further monetary damages against Ms. Williams with respect to all of the subject matter of the compromise – which included his claim that Ms. Williams embezzled from him. See, *Adder*, 288 N.C. at 492, 219 S.E.2d at 195.

However, the trial court concluded that the settlement agreement entered into by the parties did not prohibit the court from ordering that restitution be paid by Ms. Williams to Mr. Fogleman in the criminal case. In its findings of fact and conclusions of law, the trial court recognized two things – that there was a settlement agreement signed by the parties and that Ms. Williams paid Mr. Fogleman “the \$13,500 settlement sum” to fully resolve the civil matter. Yet in doing so, the trial court failed to acknowledge two things – that the settlement agreement contained a binding general release clause, and that a binding general release clause based on valuable consideration acts as a complete defense to a subsequent action for damages arising out of the offense. *Talton v. Mac Tools, Inc.*, 118 N.C. App. 87, 90, 453 S.E.2d 563, 565 (1995).

Therefore, when Ms. Williams paid Mr. Fogleman \$13,500.00, his acceptance of that payment constituted full settlement of his claims

against Ms. Williams and, per the language of the release clause, released Ms. Williams from any further financial liability arising from the offense. (Rpp. 116-17) Accordingly, Mr. Fogleman could not then be awarded an additional \$27,704.85 in restitution as a result of the state's criminal prosecution of Ms. Williams for the offense, and the trial court erred in ordering that payment.

E. The state was not a party to the settlement agreement and release clause, therefore, the state was not bound by the agreement from proceeding against Ms. Williams criminally in order to obtain a criminal conviction. But Mr. Fogleman was barred from receiving additional remuneration for his loss in the form of criminal restitution.

When a defendant and a victim enter into a settlement agreement resolving their civil claims, such an agreement "cannot take away the right of the State to insist upon a conviction for the offense already committed." *State v. Pace*, 210 N.C. 255, 258, 186 S.E. 366, 368 (1936)(citing *Spalding v. People*, 49 N.E. 993 (Ill. 1898)). Whatever agreement Ms. Williams and Mr. Fogleman entered into in the civil action, that agreement cannot in any way bind the State of North Carolina from prosecuting Ms. Williams criminally for embezzlement. Nor does Ms. Williams' payment of \$13,500.00 to Mr. Fogleman work as absolution for the crime, *State v. Summers*, 141 N.C. 841, 842, 53 S.E.

856, 857 (1906), because “the restitution of money that has been either stolen or embezzled . . . to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment and conviction for such larceny or embezzlement.” *Pace*, 210 N.C. at 257-58, 186 S.E. at 368. Accordingly, the state could criminally prosecute Ms. Williams for embezzlement and obtain a conviction against her for that crime, irrespective of any civil settlement agreement reached between Ms. Williams and Mr. Fogleman. But in doing so, the state could not, on behalf of Mr. Fogleman, obtain an award of restitution for him in the course of the criminal action.

In North Carolina, restitution is awarded by the court to the “victim of the offense in question.” N.C. Gen. Stat. § 15A-1340.34(a) (2016). The prosecution seeks restitution on behalf of the victim and the restitution is awarded to the victim. The state is not the victim. Therefore, the prosecution does not seek restitution on behalf of the state nor is restitution awarded to any state agency. N.C. Gen. Stat. § 15A-1340.37(c)(2016). Therefore, the restitution in this case, although a product of the state’s criminal prosecution of Ms. Williams for embezzlement, was requested by the state on behalf of, and awarded by

the trial court to, Mr. Fogleman. Mr. Fogleman was a party to the civil action and elected to negotiate an end to the civil action by entering into a settlement agreement, the terms of which specifically stated that the parties agreed to settle the matter for \$13,500.00. When Ms. Williams paid Mr. Fogleman \$13,500.00, his acceptance of that payment constituted full settlement of his claims against Ms. Williams for embezzlement and, per the language of the release clause, released Ms. Williams from any further financial liability arising from the offense. (Rpp. 116-17)

Accordingly, Mr. Fogleman could not then be awarded an additional \$27,704.85 in restitution as a result of the state's criminal prosecution of Ms. Williams for the offense, and the trial court erred in ordering that payment.

F. If Mr. Fogleman wanted to maintain the ability to obtain restitution in a subsequent criminal proceeding from Ms. Williams, it was his burden to reserve that right in the civil settlement agreement.

If Mr. Fogleman wished to retain the ability to obtain further remuneration from Ms. Williams subsequent to the resolution of the civil action, it was his obligation to reserve that right in the settlement

agreement. Mr. Fogleman did not do so and cannot now import limitations therein which were not contained within the settlement agreement. “[I]t is the burden of parties entering into a settlement agreement to expressly reserve in the agreement any rights that they wish to maintain beyond the date of the settlement agreement.” *Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1373 (Fed. Cir. 1999).

Mr. Fogleman was not required to enter into a settlement agreement or sign a general release. He chose to do so. In negotiating the release, he could have reserved his right to seek additional monetary damages in the form of restitution in a subsequent criminal proceeding. He chose not to do so. At the time he entered into the settlement agreement, Mr. Fogleman was represented by counsel and was well-aware of the fact that Ms. Williams had embezzled from him. If he intended to leave open the option of obtaining additional money from Ms. Williams for the offense beyond the \$13,500.00 she paid him as a result of the civil settlement agreement, his intent should have been made manifest. The rule regarding possible claims that were, or

should have been, known at the time of a settlement agreement is as follows:

The rule for releases is that absent special vitiating circumstances, a general release bars claims based upon events occurring prior to the date of the release. And no exception to this rule should be implied for a claim whose facts were well enough known for the maker of the release to frame a general description of it and request an explicit reservation.

Johnson, Drake & Piper v. United States, 531 F.2d 1037, 1047 (Ct. Cl. 1976).

Quite simply, “[i]f the parties intend to leave some things open and unsettled their intent so to do should be made manifest” in the settlement agreement. *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907). Mr. Fogleman did not reserve his right to seek additional financial awards from Ms. Williams for the offense. Accordingly, Mr. Fogleman could not then be awarded an additional \$27,704.85 in restitution as a result of the state’s criminal prosecution of Ms. Williams for the offense, and the trial court erred in ordering that payment.

G. When the language of the settlement agreement is plain and unambiguous, the terms of the agreement controls and a court cannot look beyond the agreement to determine the parties' intentions.

When a written agreement is explicit, the court must so declare, irrespective of what either party thought the effect of the contract to be. *Howland v. Stitzer*, 240 N.C. 689, 696, 84 S.E.2d 167, 172 (1954). At the restitution hearing, Mr. Fogleman testified that he believed he was entitled to obtain additional monetary damages from Ms. Williams in the criminal action because he understood that the settlement agreement in the civil action “has nothing to do with the criminal matter.” (Rp. 56) However, Mr. Fogleman cannot escape the plain language of the settlement agreement, which included a general release clause releasing Ms. Williams from further financial liability for the offense.

North Carolina law clearly provides that “when the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court . . . and the court cannot look beyond the terms of the contract to determine the intentions of the parties.” *Hartman v. Hartman*, 80 N.C. App. 452, 343 S.E.2d 11, 13 (1986) (quoting *Piedmont Bank & Trust Co. v. Stevenson*, 79 N.C. App.

236, 339 S.E.2d 49, 52 (1986); *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 958 F. Supp. 1087, 1094 (W.D.N.C. 1997) (commenting that “where [the release] language is unambiguous, the written agreement controls”).

When a party to a civil action signs a general release, the plain provisions of which “are sufficient to bar any manner of claim or action, arising from” the offense in question, the party cannot later assert that he is not bound by the agreement. *McNair v. Goodwin*, 262 N.C. 1, 8, 136 S.E.2d 218, 223 (1964). Because it is “presumed the parties intended what the language used clearly expresses” a settlement agreement “must be construed to mean what on its face it purports to mean.” *Hartford Acc. & Indem. Co. v. Hood*, 226 N.C. 706, 40 S.E.2d 198, 201 (1946).

When Ms. Williams and Mr. Fogleman signed the settlement agreement and Ms. Williams paid Mr. Fogleman \$13,500.00, his acceptance of that payment constituted full settlement of his claims against Ms. Williams for the offense. Per the plain and unambiguous language of the release clause, Ms. Williams was released from any further financial liability arising from the offense. (Rpp. 116-17) Mr.

Fogleman's misunderstanding of the scope of the civil settlement agreement and release clause is irrelevant in light of the clear and unambiguous written language of the agreement to the contrary. Accordingly, Mr. Fogleman could not then be awarded an additional \$27,704.85 in restitution as a result of the state's criminal prosecution of Ms. Williams for the offense, and the trial court erred in ordering that payment.

H. The remedy for a frivolous lawsuit is the imposition of Rule 11 sanctions.

At the restitution hearing, the prosecution argued that the enforcement of the parties' civil settlement agreement to bar Mr. Fogleman's recovery of additional money for the offense would lead to the creation of bad policy and practices. The prosecution argued that if Ms. Williams prevailed on this issue, it would create "a playbook for every defense attorney in Alamance County, whose client has been charged with an embezzlement case," to file a "baseless" civil action against the victim and then settle the claim for a lesser amount than is "alleged in the criminal case . . . and then, turn around, after reaching that settlement agreement" and argue in criminal court that the parties

are prohibited from collecting additional damages in the form of restitution. (Rpp. 111-12) This argument is erroneous.

The law already has in place procedures to prevent the filing of baseless civil actions – Rule 11 sanctions. N.C. Gen. Stat. § 1A-1, Rule 11 directs that a trial court “shall” impose sanctions if a party files a pleading for “any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.” *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996). A party “will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents or cause them unnecessary cost or delay.” *Id.* at 382, 477 S.E.2d at 238.

If Ms. Williams’ civil action was a baseless action utilized solely so that she could maneuver herself into a position whereby she would pay Mr. Fogleman substantially less money than she actually embezzled from him, Mr. Fogleman had several options available to him. He could have chosen not to settle with Ms. Williams. He could have proceeded against Ms. Williams and her attorney for Rule 11 sanctions, particularly if, as the prosecutor alleged, Ms. Williams’ lawsuit was “baseless.” (Rp. 111) However, Mr. Fogleman chose otherwise. Instead,

Mr. Fogleman chose to: settle with Ms. Williams; sign a settlement agreement which contained a general release clause; and, accept \$13,500.00 as full settlement of his claims against Ms. Williams for the offense. Accordingly, Mr. Fogleman could not then be awarded an additional \$27,704.85 in restitution as a result of the state's criminal prosecution of Ms. Williams for the offense, and the trial court erred in ordering that payment.

I. Conclusion

Mr. Fogleman accepted \$13,500.00 from Ms. Williams to settle the civil action. In settling the civil action, Mr. Fogleman agreed to fully release and discharge Ms. Williams from any subsequent monetary claims arising from her embezzlement from him. Accordingly, Mr. Fogleman was barred from recovering additional damages in the form of restitution in a criminal prosecution for that embezzlement and the trial court erred in concluding otherwise. Therefore, the restitution award in this case must be vacated.

CONCLUSION

For the foregoing reasons and authorities, Ms. Williams respectfully requests that this Court issue its writ of certiorari to review

issues argued in this brief and fully contained in the petition filed contemporaneously with this brief, on the merits, and that the order directing her to pay restitution be vacated.

Respectfully submitted, this the 28th day of December, 2018.

(Electronically Filed)
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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)

I hereby certify that Defendant-Appellant's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in fourteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This the 28th day of December, 2018.

By Electronic Submission:
Katherine Jane Allen
Assistant Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant's Brief was filed electronically, pursuant to Rule 26, with the Clerk of the North Carolina Court of Appeals.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's Brief has been duly served upon Madeline Lea, Assistant Attorney General, North Carolina Department of Justice, by email to: mlea@ncdoj.gov.

This the 28th day of December, 2018.

(Electronically Filed)
Katherine Jane Allen
Assistant Appellate Defender