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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHAEL RYAN TERRY, JR., Defendant-Appellant.	UNPUBLISHED October 21, 2026 1:30 PM No. 361343 Wayne Circuit Court LC No. 21-000330-01-FC

Before: PATEL, P.J., and M. J. KELLY and GARRETT, JJ.

PER CURIAM.

Defendant Michael Ryan Terry, Jr., fatally shot James Green, Jr., in the chest. The men were involved in a proverbial "love triangle" with Nyesha Harper, who spent time with and had sexual relations with both men. The tension between Terry and Green culminated when Green entered Harper's home unannounced and found Terry with Harper, who was wearing only a bra and underwear. Terry shot Green one time and left the home. The prosecution charged Terry with first-degree murder, MCL 750.316; felon in possession of a firearm (felon-in-possession), MCL 750.224f; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He appeals by right his jury-trial convictions of second-degree murder, MCL 750.317, felon-in-possession, and two counts of felony-firearm. Because trial counsel rendered ineffective assistance of counsel by failing to request a jury instruction on voluntary manslaughter as a lesser included offense of first-degree murder, we reverse Terry's second-degree murder conviction and corresponding felony-firearm conviction and remand for further proceedings with respect to those charges.

I. FACTUAL BACKGROUND

Nyesha Harper considered Terry her best friend. She and Terry were sexually intimate from time to time but they were not in a dating relationship, although Terry had told her more than once that he loved her and wanted to be in a relationship with her. Harper and Green had a young child together, and Green visited Harper's home "as he pleased." Green and Harper lived together until March 2020, when Harper moved out, and both had "trust issues" involving the other. In October 2020, they were "still seeing each other" and "hanging out," but they were not involved

in a dating relationship although they were still "trying to pursue a relationship." Green suspected that Terry was in love with Harper, and her friendship with Terry caused friction between Harper and Green. Green was "not happy" about Harper's relationship with Terry and became angry when Harper went on a trip with Terry in July 2020 without telling him she was going.

Either in the late night hours of October 2, 2020, or the early morning hours of October 3, 2020, Harper was with Terry and Harper's cousin at an after-hours club. Harper was surprised to see Green there and went over to him to talk to him. He was not happy, presumably because she was there with Terry. Harper, her cousin, and Terry left the club in her vehicle, but Green followed them in his own vehicle. While Harper was stopped at a stop light, Green cut in front of her car and got out of his truck. Harper's cousin threw a juice bottle at Green, and Harper turned down a street to avoid him. Shortly afterward, Green chased Harper's vehicle in his truck while she tried to drive away from him. She ultimately went home by herself. She did not want Terry to come home with her in case Green showed up at her house. She was concerned about the two men "hurting each other" if Terry was at her house when Green arrived. She told Terry that Green wanted to fight him.

At approximately 10:00 or 11:00 a.m. on October 3, 2020, Terry came to Harper's home and parked in her driveway. He and Harper spent the day together, and he stayed overnight. They continued to spend time together at Harper's home on October 4, 2020, and did not leave the home. At approximately 6:00 p.m. that day, Terry and Harper were watching television in Harper's living room. Terry was lying on the floor in front of the couch wearing shorts with no shirt. Harper was lying on the couch wearing only a bra and panties. They heard a commotion at the front door. Because the door was broken, Harper had placed items in front of the door to prevent persons from entering the home. After the items were pushed aside, Terry and Harper realized the person entering the home was Green, who sometimes came to the home unannounced. When Green saw Terry and Harper, he stated, "[O]h, so this is what we're doing." Harper did not know what Green meant by the statement and asked him what he meant. Green walked around the couch toward Terry, and Harper "hopped up" and stood on the couch. According to Harper, Green approached Terry. When Green was "a couple steps" away from Terry, Terry fired one gunshot, which struck Green in the chest, ultimately killing him. Green was "possibly" close enough to touch Terry but did not do so before Terry fired the gun. Terry then gathered his belongings and left. Harper called 911.

Within a few days after the shooting, Harper visited Terry's father, who told her there was someone on the phone who wanted to talk to her. Harper recognized Terry's voice on the phone. He apologized and told her "he couldn't let [Green] get one up on him." The police apprehended Terry in Mississippi, and he was extradited to Michigan. During a police interview, he stated that the shooting incident had been the first time he, Harper, and Green were alone together. According to Terry, Green threw Harper on the couch and then choked Terry before he fired his gun. Terry maintained that he was not trying to kill Green but was trying to defend himself because Green had attacked him. Terry indicated that gunshot residue testing of Green's clothing would reveal the presence of gunshot residue because Green was very close to him when he fired his gun. Green's clothing was not provided to the Detroit Police Department and was not tested for gunshot residue.

Terry's defense at trial was self-defense. Following the presentation of the evidence, the trial court asked the parties whether they wanted the court to include jury instructions on lesser included offenses. With respect to manslaughter, defense counsel, Mark Brown, stated, "Mr. Terry and I discussed the manslaughter, but, Mr. Terry, we're not going to ask for manslaughter, is that correct? We talked about it last night and, in fact, before, is that correct?" Terry responded affirmatively. The trial court instructed the jury on first-degree murder and second-degree murder but not manslaughter. After the jury began deliberating, it sent the court a note indicating it was "at a stalemate" on the murder charge. The court directed the jury to resume its deliberations. The jury convicted Terry of second-degree murder, felon-in-possession, and two counts of felony-firearm.

Thereafter, Terry moved for a new trial based on ineffective assistance of counsel. He argued that Brown's representation was deficient because he failed to request a voluntary-manslaughter jury instruction. The prosecution responded that Terry waived his right to challenge the jury instructions by expressing agreement with them and was not entitled to a voluntary-manslaughter instruction in any event. The prosecution asserted that the jury had rejected Terry's self-defense argument, and it was reasonable to assume the jury also would have rejected the argument that Terry shot Green based on adequate provocation.

The trial court held a *Ginther*[1] hearing, at which Brown testified that his primary trial strategy was self-defense. When asked why he chose to include a second-degree murder instruction, Brown erroneously stated, "I think that you're required to give a second-degree murder instruction when you're faced with first-degree[.]" He also testified he did not "want to include another option to be found guilty." Brown could not recall whether he discussed the elements of manslaughter with Terry and acknowledged that self-defense was a complete defense to manslaughter. When asked whether he calculated the sentencing guidelines for voluntary manslaughter, Brown testified:

> I don't know. I really don't know that. Well, I you know, common sense. Manslaughter has a cap [of] 15 years on it. Which means a cap of 10 years on it. Which you know, I know.
>
> So 10 years could be the most you can get for a manslaughter conviction I believe. So that, in that regard and with perhaps any kind of habitual you know whatever. But it would be probably less than it would be for certainly murder in the second-degree.

Terry testified that, to his knowledge, Brown never calculated the sentencing guidelines for voluntary manslaughter, or any of the offenses, and told him that he "could be looking at . . . up to 20/25 years" for voluntary manslaughter. Terry maintained that his appellate attorney calculated his sentencing guidelines for voluntary manslaughter to be "19 months to . . . close to about 5 years." Terry recalled agreeing with Brown's statement on the record at trial not to request a voluntary-manslaughter instruction, but he testified he did so because he believed he could be

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

sentenced to 20 or 25 years for voluntary manslaughter. He asserted, "I would' a been a fool to waive [voluntary manslaughter] if I would' a knew what my guidelines was at the time."

The trial court denied Terry's motion for a new trial. It determined that the evidence did not support a voluntary-manslaughter instruction because the killing did not occur in the heat of passion. The court reasoned that Terry and Harper were not married and no evidence showed "that there was some type of love triangle between the three individuals." The court also reasoned that Terry had not been adequately provoked, he indicated he put his gun away when he realized Green was the person entering Harper's home, and he failed to show that there was an insufficient amount of time to cool down and control his passions. In addition, the court determined that Brown and Terry's decision not to request a voluntary-manslaughter instruction was based on sound trial strategy to limit Terry's defense to "a single defense of self-defense," and Brown and Terry repeatedly expressed agreement with the court's instructions. Finally, the court determined that Brown did not render ineffective assistance of counsel by failing to advise Terry of the elements of manslaughter and his possible sentence if he was convicted of voluntary manslaughter. This appeal followed.

II. DISCUSSION

Terry argues that Brown rendered ineffective assistance of counsel by failing to explain how his case fit the legal definition of manslaughter, failing to request a voluntary-manslaughter jury instruction, and failing to advise him of his sentencing exposure if the jury convicted him of voluntary manslaughter. Terry asserts that Brown's deficient performance led him to waive voluntary manslaughter as a lesser included offense at trial. For the reasons discussed below, we agree.

A. PRESERVATION AND STANDARD OF REVIEW

A defendant's express approval of jury instructions waives appellate review of an alleged instructional error. *People v Head*, 323 Mich App 526, 537; 917 NW2d 752 (2018). However, a defendant may obtain relief on a waived claim of instructional error by establishing that he received ineffective assistance of counsel. *People v Traver*, 502 Mich 23, 43 n 10; 917 NW2d 260 (2018). Terry preserved his ineffective assistance of counsel claim by moving for a new trial and an evidentiary hearing in the trial court. See *Head*, 323 Mich App at 538-539. A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v Leffew*, 508 Mich 625, 637; 975 NW2d 896 (2022). We review for clear error the trial court's findings of fact and review de novo questions of constitutional law. *Id*. De novo review "means that we review the issue independently, without any required deference to the trial court." *Id*. (quotation marks and citation omitted). Clear error exists if we are left with a definite and firm conviction that the trial court erred. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014).

B. ANALYSIS

The United States and Michigan constitutions guarantee a criminal defendant the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate "that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance,

there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The performance inquiry examines "whether counsel's assistance was reasonable considering all the circumstances." *Id*. at 688. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Head*, 323 Mich App at 539 (quotation marks, brackets, and citation omitted).

Defense counsel is accorded wide discretion involving matters of strategy, and it is presumed that counsel's actions are based on sound trial strategy. *Strickland*, 466 US at 689. "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). However, review of counsel's performance cannot be insulated by calling it trial strategy. *Trakhtenberg*, 493 Mich at 52. Counsel is required to conduct a reasonable investigation, and a court must determine whether counsel's "strategic choices were made after less than [a] complete investigation[.]" *Id*. (quotation marks and citation omitted). Counsel's strategy must be sound, and the decisions made must be objectively reasonable. *Douglas*, 496 Mich at 585.

Brown testified at the evidentiary hearing that his primary trial strategy was self-defense "[b]ut also that there was a lack of premeditation and deliberation." He further maintained he did not want to give the jury a third option, in addition to first- and second-degree murder, to find Terry guilty. "Failing to request a particular jury instruction can be a matter of trial strategy." *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013). Trial counsel's decision not to request a lesser included offense instruction, "particularly when pursuing an all-or-nothing defense aimed at securing an acquittal" can be a legitimate trial strategy. *People v Englebrecht*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 370317); slip op at 13 (quotation marks and citation omitted). "However, counsel's strategic decisions must be objectively reasonable," and the failure to request a jury instruction can be "objectively unreasonable." *People v Yeager*, 511 Mich 478, 488, 490; 999 NW2d 490 (2023).

Because the jury was instructed on second-degree murder, as a lesser included offense of first-degree murder, self-defense was not an "all-or-nothing" strategy. Brown testified he believed a second-degree murder instruction was required whenever a defendant is charged with first-degree murder. Brown's belief was legally erroneous. Our Supreme Court has stated, "In light of our holding that a requested instruction on a necessarily included offense must be supported by the evidence, an instruction on second-degree murder, as a necessarily included lesser included offense of first-degree murder, is not automatically required." *People v Cornell*, 466 Mich 335, 359 n 13; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527 (2003). Although a second-degree murder instruction was not required, one was given. Therefore, self-defense was not an all-or-nothing defense. Brown also testified he was aware that self-defense was a complete defense to manslaughter. Thus, he was cognizant that if the jury found that Terry acted in self-defense, it would not have convicted him of any offense with respect to the shooting, including voluntary manslaughter. Accordingly, voluntary manslaughter was not inconsistent with self-defense, and self-defense was not an all-or-nothing defense because the jury was instructed on second-degree murder. In these circumstances, Brown's failure to request a voluntary-manslaughter instruction was not objectively reasonable.

Moreover, the evidence supported a voluntary-manslaughter instruction. Our Supreme Court has described voluntary manslaughter as follows:

> [T]he defendant must kill in the heat of passion, the passion must be caused by adequate provocation, and there cannot be a lapse of time during which a reasonable person could control their passions. The provocation must be sufficient to cause the defendant to act out of passion rather than reason, but it also must be sufficient to cause a reasonable person to lose control, not just the specific defendant. [*Yeager*, 511 Mich at 489.]

"Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). Provocation and heat of passion negate the element of malice, which is the sole element distinguishing voluntary manslaughter from murder. *Yeager*, 511 Mich at 489-490. Malice is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Baskerville*, 333 Mich App 276, 284; 963 NW2d 620 (2020) (quotation marks and citation omitted). "[V]oluntary manslaughter serves to mitigate an intentional killing because the law, out of indulgence to the frailty of human nature, regards the offense as of a less heinous character than murder, and designates it manslaughter." *People v Joesel*, ___ Mich ___, ___; 36 NW3d 293, 297 (2026) (quotation marks and citation omitted). Although anger has been recognized as an emotional state sufficient to mitigate murder to voluntary manslaughter, there is no "requisite emotional state for voluntary manslaughter." *Yeager*, 511 Mich at 492-493. Rather, "the defendant's thinking must have been disturbed by an undefined emotional excitement." *Id*. at 493. "Only a modicum of evidence of provocation is required to justify a voluntary-manslaughter instruction." *Joesel*, ___ Mich at ___; 36 NW3d at 297 (quotation marks and citation omitted).

In *Yeager*, the defendant shot and killed her boyfriend, Jonte Brooks, after he punched her in the face with his gun, pulled her out of her minivan by her hair, continued to physically assault her, and tried to run her over while driving her minivan. *Id*. at 484-485. A neighbor observed Brooks trying to run over the defendant and agreed to assist her in retrieving her minivan. She got into the neighbor's truck, which the neighbor drove to a gas station while the defendant talked to Brooks on her cell phone. Brooks pulled the minivan behind the truck in the gas station parking lot, and the defendant got out of the truck and fatally shot Brooks with the neighbor's gun. *Id*. at 485. At trial, the defendant's attorney argued the defendant acted in self-defense. *Id*. at 486. The trial court instructed the jury on first- and second-degree murder, but defense counsel did not request a voluntary-manslaughter instruction, which the defendant asserted denied her the effective assistance of counsel. *Id*.

Our Supreme Court determined that trial counsel's decision not to request a voluntary-manslaughter instruction was objectively unreasonable and was based on counsel's erroneous belief that manslaughter required an intent to kill the deceased. *Id*. at 490-491. The Court explained that the element of intent did not distinguish murder from voluntary manslaughter and that, instead, "the distinction between murder and voluntary manslaughter is the element of malice, which in voluntary manslaughter is 'negated by the presence of provocation and heat of passion.' "

Id. at 491, quoting *Mendoza*, 468 Mich at 540. The Court also determined that the evidence supported a voluntary-manslaughter instruction. *Yeager*, 511 Mich at 491. The Court reasoned that the shooting was the culmination of a series of events that involved Brooks physically assaulting the defendant and threatening to kill her. *Id*. at 491-492. The defendant testified that she shot Brooks because she was scared, and the neighbor described the defendant as "hysterical and crying" after she shot Brooks. The Court opined, "A jury could reasonably conclude that the combination of physical and verbal threats from Brooks throughout this unbroken chain of events stoked defendant's passions so that she acted out of heightened emotion rather than reason in shooting Brooks." *Id.* at 492.

In the instant case, the trial court erroneously determined that the facts failed to suggest that the shooting may have occurred in the heat of passion. The court opined that Terry and Harper were not married, and no evidence indicated "that there was some type of love triangle." The court's determination that the evidence was not indicative of a "love triangle" was clearly erroneous. Harper testified she had sexual relations with both Terry and Green from time to time and was not in a relationship with either man at the time of the shooting, although she and Green "were still trying to pursue a relationship." Harper's friendship with Terry caused friction and "trust issues" between Harper and Green, who believed Terry was in love with Harper. Less than 48 hours before the shooting, Green became angry when he saw Harper with Terry at an after-hours club. He got into his truck and chased Harper's vehicle, in which Terry was a passenger. Harper told Terry she did not want him to come to her house afterward because she was concerned about what would happen if Green appeared at her house and Terry was there. She told Terry that Green wanted to fight him.

Later that day, Terry came to Harper's home and parked in her driveway. He and Harper spent the remainder of the day together, and he stayed overnight. The following day, Green arrived at Harper's home unannounced. Harper testified that hearing the door open gave her cause for alarm. Green had parked across the street and left his truck running with the child he had in common with Harper inside the vehicle. Harper testified it was strange for Green to leave his truck running with their child inside. When Green entered the home, Terry was lying on the floor wearing shorts with no shirt, and Harper was lying on the couch wearing only a bra and underwear. Green remarked, "[O]h, so this is what we're doing." When Harper realized the person entering her home was Green, she jumped up and stood on the couch. Terry told the police he put his gun away when he recognized Green because he did not want to kill him, but he pulled his gun back out when Green approached him. Green was substantially larger than Terry, who was approximately five feet, seven inches tall and weighed about 150 pounds. Terry testified that he was scared of Green. Terry told the police the entire encounter occurred in a matter of seconds, and it was the first time that Green, Terry, and Harper were alone together. Although Terry and Green had been around each other previously, other persons had always been present.

A jury could reasonably conclude, based on the above circumstances, that Terry shot Green in the heat of passion caused by adequate provocation. The tension between Terry and Green culminated in an encounter in which Green walked in on Terry and Harper, neither of whom was fully dressed. Green did not bring his child with him into the home and left the child in his truck, which Harper testified was unusual. That circumstance indicates that Green was aware that something might occur that he did not want the child to witness. Green was also aware that someone was in the home with Harper because Terry's vehicle was parked in her driveway. It is

unclear from the record whether Green was aware that the vehicle belonged to Terry, but a reasonable jury could conclude that Green suspected it was Terry's vehicle because Green had recently observed Harper and Terry together. The shooting occurred in a matter of seconds, and the jury could reasonably determine that there was not "a lapse of time during which a reasonable person could control their passions." *Yeager*, 511 Mich at 489. Brown testified that the lack of premeditation and deliberation was a secondary defense to the shooting. Further, the temporary excitement required for heat of passion "does not have to entirely dethrone or overpower reason; rather, it is sufficient that reason is disturbed or obscured by passion to an extent which might render ordinary people, of fair average disposition, liable to act rashly or without due deliberation or reflection." *Joesel*, ___ Mich at ___; 36 NW3d at 298 (quotation marks, brackets, emphasis, and citation omitted). In these circumstances, the trial court clearly erred by determining that the evidence did not suggest a "love triangle" and the emotions associated with one. "[A] rational view of the evidence in this matter support[ed] [a] voluntary-manslaughter instruction and a jury making the determination of whether there was provocation sufficient to mitigate murder to manslaughter." See *Joesel*, ___ Mich at ___; 36 NW3d at 299.

Terry argues that Brown failed to explain voluntary manslaughter to him, including his possible sentence if the jury convicted him of that offense, and he waived a voluntary-manslaughter instruction relying on Brown's advice, or lack thereof. Terry correctly asserts his sentencing guidelines would have been 50 to 125 months (4 years and 2 months to 10 years and 5 months), even accounting for his status as a second-offense habitual offender, if the jury convicted him of voluntary manslaughter. An attorney's deficient advice regarding a sentence can fall below an objective standard of reasonableness and constitute ineffective assistance of counsel. See *Douglas*, 496 Mich at 591-593 (counsel's erroneous advice regarding the defendant's sentence if he was convicted at trial fell below an objective standard of reasonableness). Terry testified that Brown advised him that he "could be looking at . . . up to 20/25 years" if he was convicted of voluntary manslaughter. When asked whether he calculated Terry's sentencing guidelines for voluntary manslaughter, Brown responded, "I don't know." If he had done so, he would have discovered that Terry would likely have received a *significantly* shorter sentence for voluntary manslaughter than for second-degree murder. While the upper end of Terry's guidelines for voluntary manslaughter was 10 years and 5 months, the upper end of his guidelines for second-degree murder was 39 years or life. Terry is currently serving a minimum sentence of 35 years' imprisonment. An attorney's strategic decisions must be made based on a reasonable investigation or "a reasonable decision that makes particular investigations unnecessary." *Trakhtenberg*, 493 Mich at 52 (quotation marks and citation omitted). Considering the substantial difference in Terry's possible sentence, Brown's representation fell below an objective standard of reasonableness to the extent that he failed to investigate and convey to Terry his sentencing exposure if the jury convicted him of voluntary manslaughter. Terry testified that he agreed to waive a voluntary-manslaughter instruction because he relied on Brown's advice.

Finally, we conclude that Brown's deficient performance prejudiced Terry. "Whether the absence of an instruction on a lesser included offense is harmless depends on the facts and circumstances of the individual case." *Joesel*, ___ Mich at ___; 36 NW3d at 300. In cases in which a voluntary-manslaughter instruction was warranted, the lack of certainty about what the jury might have concluded is sufficient to undermine confidence in the outcome. *Strickland v Washington*, 466 US at 694; *Joesel*, ___ Mich at ___; 36 NW3d at 301. Like *Joesel*, the fact that

the jury convicted Terry of second-degree murder sheds little light on what it would have decided if it was given a voluntary-manslaughter option. See *Joesel*, ___ Mich at ___; 36 NW3d at 301. Notably, the jury in the instant case informed the trial court at one point that it was not unanimous on the murder charge and believed it was "at a stalemate" regarding that charge. Accordingly, we conclude that but for Brown's deficient performance, a reasonable probability exists that the outcome would have been different. See *Trakhtenberg*, 493 Mich at 51.

III. CONCLUSION

Brown's failure to ascertain and advise Terry of his possible sentencing exposure if the jury convicted him of voluntary manslaughter fell below an objective standard of reasonableness. Because Terry would have received a substantially shorter sentence if the jury had been instructed on voluntary manslaughter as a lesser included offense of murder, and the evidence supported the instruction, Brown's failure to request the instruction and advice to Terry that he waive the instruction was not objectively reasonable. Further, Brown's advice did not constitute sound trial strategy when self-defense was a complete defense to murder and voluntary manslaughter, and self-defense was not an all-or-nothing defense because of the second-degree murder option. Accordingly, we reverse Terry's second-degree murder conviction and associated felony-firearm conviction and remand for further proceedings regarding those charges. Because we conclude that Terry is entitled to a new trial, we need not address his remaining arguments.

Reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Sima G. Patel
/s/ Michael J. Kelly
/s/ Kristina Robinson Garrett