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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 08CA2694 THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. CAREY ANDRE GRIFFIN, Respondent.	▲ **COURT USE ONLY** ▲ Case No. 11SC351
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PEOPLE'S REPLY BRIEF

Counsel certifies that the following reply brief contains 4,781 words.

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STATEMENT OF THE CASE

Following the filing of the People's Opening Brief, defense counsel notified the Court and the People of the unfortunate death of the defendant, Carey Andre Griffin. Although this Court initially granted a motion to dismiss filed by defense counsel, this Court reinstated the case and accepted two more issues for review:

III. Whether the proper resolution of a certiorari review of a conviction reversed on direct appeal is abatement *ab initio* when the defendant has died during the pendency of such review.

IV. In any event, whether the issues accepted for review in this case are of sufficient public importance and may evade future review such that resolution by the Court is warranted despite the defendant's death.

For the purpose of continuity, the People will address the issues in the order set forth in the Defendant's Answer Brief: Issue III and Issue IV (which will be addressed together); Issue I; and Issue II.

ARGUMENT

I. This case should not be dismissed and the defendant's conviction vacated based on the doctrine of abatement *ab initio*. Further the issues are of sufficient importance and capable of evading review that this Court should review this case. (Issues III and IV)

The defendant contends that this Court should apply the abatement *ab initio* doctrine due to the unfortunate death of Mr. Griffin. The People respectfully disagree.

While this Court has twice addressed the principal of abatement, this Court has not clearly considered and adopted the doctrine of abatement *ab intio*. When the doctrine was developed in the common law, the focus was on the defendant and the impact of the punishment on him and on his heirs. However, courts have come to recognize that there are competing interests that disfavor the application of the doctrine. These interest include those of victims, the judicial system, and society. Further, where, as here, the case involves a published

opinion interpreting the requirement of a criminal statute, the interests of society and the judicial system are increased.

Standard of review. The People agree that this issue is properly before the Court. Whether the doctrine of abatement *ab initio* should be adopted by this Court and applied in this case is a question of law. *See State v. Burrell*, 837 N.W.2d 459, 462 (Minn. 2013).

It is appropriate to first define and distinguish "abatement" and "abatement *ab initio*." "Abatement" is the discontinuance of a legal proceeding for reasons unrelated to the merits of the claim. *Burrell*, 837 N.W.2d at 463, *citing Black's Law Dictionary* 3 (9th ed. 2009). "Ab initio" means from the beginning. *Burrell*, at 463, *citing Black's Law Dictionary* at 5. The "abatement *ab initio*" rule provides that a defendant's "death pending direct review of a criminal conviction discontinues not only the appeal but also all proceedings in the prosecution from the beginning." *Burrell*, at 463.

The adoption of the abatement *ab initio* doctrine appears to rest historically on a seemingly straightforward rationale: punishment of a defendant was the sole effect a criminal conviction and sentence. *See*

State v. Korsen, 111 P.3d 130, 134 (Idaho 2005) ("[I]n 1946, the abatement doctrine was appropriate since, at that time, there was generally no non-punitive effect of a criminal conviction and sentence."). It followed, that that if a defendant passed away, punishment could not be exacted:

> A judgment can not be enforced when the only subject matter upon which it can operate has ceased to exist. When the defendant, ordered to be punished, is dead, the execution of that order is absolutely arrested; -- for the future it is as entirely a nullity as any subsequent judgment arresting it can possibly make it to be. There can not be a new trial with the executors or administrators as parties, if a new trial should be awarded, because the common law admits the trial of no one for felony who is not personally present at the trial. It would seem, therefore, to be clear that to now order either of these things to be done as of some day during the life of the deceased, and after he had sued out the writ of error, would be as vain and useless as to order them to be done now. The judgment being purely personal can not, by any possibility, after the death of the person, be made to relate back and have had an effect on his person which in fact it did not have; that is, it can not make him actually have had an opportunity for a new trial, or have arrested his punishment, or have denied his right in these respects.

O'Sullivan v. People, 32 N.E. 192, 193-194 (Ill. 1892); *see Overland v. Cotton Mill Co. v. People*, 32 Colo. 263, 75 P. 924 (1904) (abating the judgment).

Thus, a deceased defendant could not serve a prison sentence or pay a fine (a monetary form of punishment). Further, the defendant's heirs should not be obligated to pay such a fine. *See United States v. Pomeroy*, 152 F.279, 282 (C.C.S.D.N.Y 1907) ("[T]he object of criminal punishment is to punish the criminal; and not to punish his family."), *rev'd sub nom., United States v. N.Y. Cent. & H.R.R. Co.*, 164 F. 324 (1908).

Logically, this rationale only supports abatement of the punishment component of a conviction. However, in these circumstances, some courts have applied abatement *ab initio* to vacate a defendant's conviction when the defendant has died during the pendency of the direct appeal. The basis for such application is that the defendant has been deprived of the benefit of review on direct appeal.[1]

[1] As one commentator noted, courts applying abatement *ab initio* presume that the deceased defendant would have succeeded on appeal;

See, *e.g.*, *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977); *but see, Wheat v. State*, 907 So. 2d 461, 462 (Ala. 2005) ("A conviction in the circuit court removes the presumption of innocence, and the pendency of an appeal does not restore that presumption.").

The Colorado Court of Appeals has also applied abatement *ab initio* when a defendant dies during direct appeal, but not when death occurs during postconviction review. *People v. Lipira*, 621 P.2d 1389 (Colo. App. (1980) (direct appeal); *People v. Valdez*, 911 P.2d 703 (Colo. App. 1996) (postconviction review).[2]

Additionally, where a defendant has petitioned for certiorari review, the United States Supreme Court has denied application of the abatement *ab initio* doctrine. *Dove v. United States*, 423 U.S. 325 (1976), *overruling Durham v. United States*, 401 U.S. 481 (1971). The

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and apparently also presume that the State would not prevail. Razel, *Dying to Get Away With it: How the Abatement Doctrine Thwarts Justice – And What Should Be Done Instead*, 75 Fordham Law Review 2209 (2007).

[2] The Court of Appeals has also declined to apply the doctrine on direct appeal where the defendant pled guilty and the appeal was only directed at the sentence. *People v. Rickstrew*, 961 P.2d 1139 (Colo. App. 1993).

rationale attributed to this distinction is that the petitioning defendant has already had the benefit of appeal as of right, and certiorari review is discretionary. *Moehlenkamp*, 557 F.2d at 128; *Burrell*, 837 N.W.2d at 463 n.4.

However, some courts do not apply abatement *ab initio* when a defendant dies during the direct appeal. Some courts hold that the appeal is dismissed and that the conviction stands. *See*, *e.g.*, *Taylor v. State*, 72 S.E. 898 (Ga. 1911); *State v. Dodelin*, 319 S.E.2d 910 (Ga. Ct. App. 1984) ("Any further action against the defendant could not proceed even if the case be reversed on appeal."); *see Burrell*, 837 N.W.2d at 464-465 (listing ten states in this category). Other courts have concluded that the proper procedure is to allow the appeal to go forward despite the defendant's death. *See Surland v. State*, 392 Md. 17, 28, 895 A.2d 1036, 1040 (2006) (listing seven states that allow the appeal to proceed).

The continued validity of the abatement *ab initio* doctrine has been called into question in light of other interests beyond the inability to punish the defendant and the lack of a direct appeal due to a

defendant's untimely death. 75 Fordham Law Review at 2208-2210. First, the law has recognized the rights of crime victims and their interests in the conviction. In many cases, crime victims are entitled to restitution for injuries suffered as a result of the defendant's criminal conduct. This is a non-punitive effect of a conviction, since restitution is intended to make the victim whole and not to punish the defendant. *Korsen*. In *People v. Daly*, 313 P.3d 572 (Colo. App. 2011) the Court applied abatement *ab initio* to vacate the defendant's conviction but did not abate the civil judgment created by the order of restitution.

Additionally crime victims have an interest in seeing "justice done" and in validation and a sense of closure. Abatement *ab initio* treats a defendant as if he or she were never convicted and erases the crime from his or her record solely because of the death of the defendant and not through a finding of not guilty or other legal process. Such a procedural erasure of a criminal conviction is contrary to the interests of the victim of the crime. *See Wheat*, 907 So.2d at 463 ("*the trend has been away from abating a deceased defendant's conviction ab initio*" and "*[w]e expect this trend will continue as the courts and the public begin to*

appreciate the callous impact such a procedure necessarily has on the surviving victims of violent crime") (italics in the original).[3]

The judicial system also has an interest in administering justice as inexpensively and efficiently as possible, often collecting the costs of criminal proceedings from the defendant. Courts also have an interest in deciding actual cases or controversies. 75 Fordham Law Review at 2208-2210. The existence of a case or controversy does not automatically cease with the death of a criminal defendant. S*ee Surland*, 895 A.2d at 1038-1041 (questioning presumption that case becomes moot upon the death of a defendant).

The right to restitution and costs may still be at issue. Further, society and the State retain an interest in the validity of the conviction and in the correctness of any appellate opinion, particularly where, as here, that opinion is published. All our interested in the fairness of the

[3] While there are no identifiable victims in this case – the statutory purpose of the registration law is to allow persons generally to protect themselves and their children from sex offenders, section 16-22-112, C.R.S. (2012) – the interests of victims in other criminal cases demonstrates that the abatement *ab initio* doctrine should not be adopted.

justice system, compensation and justice for crime victims, and in deterrence of future criminal conduct by others. *Id.*

This Court has never clearly held that *abatement ab initio* applies in Colorado. The doctrine is not required by statute, rule or constitution. Instead, it is purely a creature of the common law. *Daly*, 313 P.3d at 572; *see United States v. Estate of Parsons*, 367 F.3d 409, 414 (5th Cir. 2004); *United States v. Rorie*, 58 M.J. 399, 405-406 (C.A.A.F. 2003) (abatement *ab initio* not constitutionally required).

This Court's precedent on abatement is extremely limited. Indeed, there are only two cases addressing the issue of what should be done when a defendant dies pending appellate review. *Overland Cotton Mill v. People*, 32 Colo. 263, 75 P. 924 (1904) and *Crowley v. People*, 122 Colo. 466, 223 P.2d 387 (1950). In both these cases, the Court abated the proceedings and the judgment focusing on the proposition that is the defendant who is to be punished and not the defendant's heirs. Neither case expressly vacated the defendant's convictions and, although *Crowley* concluded that the judgment was reversed, its purpose was to "put an end to an infliction or enforcement of the

punishment imposed by the justice of the peace." *Crowley*, 223 P.2d at 388.[4] Neither case stated that the convictions were vacated or that the proceedings were abated *ab initio*.

As the defendant notes, in an order without a published opinion, this Court ordered that a deceased defendant's convictions were vacated *ab initio*. However, this order does not constitute binding precedent, and it contains no analysis of the issue of abatement *ab initio*. Order of May 6, 2008, *People v. Versteeg*, 07SC80, 2008 Colo. Lexis 447. At most, this order indicates the application of the doctrine to a single defendant in a single case and not a broad adoption of the doctrine in Colorado.

In the present case, this Court should not apply the doctrine of abatement *ab initio*. First, the case or controversy in this case did not end with the defendant's unfortunate death. As mentioned above, a criminal conviction has non-punitive effects and there are interests

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[4] In *Daly*, the Court of Appeals found that *Overland a*nd *Crowley* had adopted abatement *ab initio*. However, that interpretation rests not on this Court's holdings in those cases but on citations in each to cases from other jurisdictions that applied abatement *ab initio*. These citations, however, are not dispositive and the content of this Court's two opinions address only abatement and not abatement *ab initio*.

involved beyond those of the defendant. The People retain an interest in the defendant's conviction even though no further punishment could be enforced. That interest includes insuring the fairness of the justice system and deterring other registrants from failing to register.

Further, because the Court of Appeals issued a published case addressing the scope of Colorado's sex offender registration laws and the requirements for proving the offense of Failure to Register, the People have a continuing interest in the review of that decision that extends beyond the validity of this defendant's conviction.

Here, the Court of Appeals opinion interpreted the registration laws to require that a defendant occupy or be physically present in a place before it constitutes a residence that triggers a duty to register. Further, the Court held that the offense of Failure to Register cannot be proven absent direct evidence of such physical presence or occupancy. The People contend that this interpretation of the statute is incorrect.

However, without this Court's review, it is likely that the issues presented here will evade review because prosecutors will simply abide by these new requirements imposed by the Court of Appeals. Equally

significant, registrants who fail to register may avoid registration and prosecution where the registration laws arguably intend otherwise. Further, the analysis of the Court of Appeals does not treat the offense of failure to register as a continuing offense and, instead, leads to an interpretation that allows registrants to avoid registration altogether. This is clearly contrary to the legislature's intent in enacting the comprehensive registration laws.

Additionally, retention of this case under these circumstances furthers the interests of judicial efficiency and economical resolution of these issues. *See* Fordham Law Review, *supra.* The issues are fully briefed and the parties are represented by counsel. Although the defendant has passed away, presumably his counsel will continue to pursue his interests in this Court. *See Korsen*, 111 P.3d at 132-133; *see also Surland*, 895 A.2d at 1041 n.3 (noting fact of minimal role of defendant in an appeal).

Given the importance of this case and the likelihood that the issues involved will evade review, it should not be dismissed under the doctrine of abatement *ab initio*. Instead this Court should reach and

resolve the substantive issues concerning the Failure to Register offense. *See Humphrey v. Southwestern Dev. Co.*, 734 P.2d 637, 639 (Colo. 1987) (recognizing that this Court may resolve an otherwise moot case where the matter is one "capable of repetition, yet evading review" or "if the matter involves a question of great public importance or an allegedly recurring constitutional violation."); *see also Surland*, 895 A.2d at 1038-1041 (questioning the premise that case becomes moot upon a defendant's death).

Here, the People had the right to pursue certiorari review in this Court and were granted such review. Although the defendant has passed away, the People's interest in the resolution of this case is not thereby diminished. While the ultimate outcome of this case may have no effect on the defendant or his heirs, his unfortunate death should not deprive the People of the right to have these important issues resolved.

II. Evidence of physical presence or occupancy in a residence is not required to prove that a defendant has "established a residence." (Issue I)

The defendant contends that physical presence or occupancy of a dwelling is required before it constitutes a residence under the registration laws for purposes of registering a new dwelling. It merits repeating that the registration statutes do not contain such a requirement. Instead, this approach relies on an interpretation under which the statutory terms "residence," "establish a residence," and "reside," treat a dwelling as a registrant's residence for some purposes (*e.g.,* notice of a new residence for purposes of cancellation of registration and notification) but not for others (*e.g.*, registration of that new residence). In addition to such inconsistency, this approach creates a gap in the structure of the registration laws even though they are designed to provide seamless continuity in the registration, deregistration, and reregistration of sex offenders.

First, the defendant focuses on whether the venue of a residence is an element of the crime of Failure to Register (Answer Brief, p. 23). To the extent the duty to register requires registration with law

enforcement in the jurisdiction where the defendant maintains a residence, and failure to register with such law enforcement agency constitutes an offense, evidence that the defendant maintained a residence in a particular jurisdiction is needed to prove the offense. However, this does not answer the question before this Court of what constitutes the establishment of a residence under the Registration Act.

The defendant relies on a dictionary definition of "resides" to argue that establishing a residence requires either occupancy or physical presence (Answer Brief, p. 27). However, the plain language of the statute, which triggers registration based on establishing a residence demonstrates that occupancy or physical presence are not required: "A person establishes a residence through an intent to make any place or dwelling his or her residency." Section 16-22-105(3), C.R.S. (2011). Additionally, this statute provides that the intent to establish a residence may be proven by evidence short of physical presence or occupancy, including the existence of a lease (a document

that is typically prepared prior to physical presence or occupancy in the residence) or by establishing a mailing address.[5] § 16-22-105(3).

The defendant further contends that the statutory language – "[a] person establishes a residence through an intent to make any place or dwelling his or her residency" – only addresses how a registrant causes a place he or she occupies, or is physically present in, to become the registrant's residence. Ultimately, the defendant's approach leads to a situation where residence means one thing for deregistration and another for reregistration.

Under section 16-22-108(3) and (4), C.R.S. (2011), a registrant who is being released from the Department of Corrections must notify the Department of where he "intends to reside" upon release. In turn, the Department must notify local law enforcement in the jurisdiction where the defendant intends to reside of the new address and must

[5] The defendant correctly points out that in the Answer Brief the People described this statutory provision as creating a "presumption." This was a poor choice of words because the statutory language does not provide for such a presumption. Instead, it provides ways of proving the intent to establish a residence. However, these methods of proving an intent to establish a residence do demonstrate that physical presence or occupancy are not required to establish a residence under the law.

contact the "occupants or owners of the residence" to insure that they are aware of the registrant's history and that they have agreed to allow the registrant to "reside at that address."

However, under the defendant's approach, this place where the defendant intends to reside is not his or her residence absent physical presence or occupancy by the registrant. This is so, even though the registrant must be truthful in providing this information and notification duties are triggered to insure that the defendant is properly listing that address and law enforcement is aware of the registrant's pending arrival. Thus, under this approach, there is no parallel duty to register in the new location because residence for purpose of reregistration is entirely different.

However, this approach is incorrect for two reasons.

First, the overall design of the registration scheme, including these particular provisions, demonstrate a legislative intent to create a seamless registration, deregistration, and reregistration system that tracks registrants at their current and future locations without interruption. Construing the language to create one residence

requirement for leaving the Department and a different one for registration at a new location following release creates a gap in this system and ultimately relieves a registrant of registering at the new location or correcting the notice provided to the Department.[6]

Second, the provision concerning notification of a registrant's change of address, which requires completion of a registration cancellation form, provides as follows:

> At a minimum, the registration cancellation form shall indicate the address at which the person will no longer reside and all of the addresses at which the person *will reside*.

Section 16-22-208(4)(a) (emphasis added).[7] This language further demonstrates that a residence may be established before one occupies or is physically present in the dwelling or place. In addition, by filling out the cancellation form, a registrant has demonstrated an intent to make

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[6] For example, under the defendant's construction, a registrant may inform the Department he is intended to move to a specific residence in Denver. However, he may instead move to Grand Junction without any obligation to correct his notice to the Department or register in Denver. This cannot be the intent of the statute.

[7] This language is currently located in §16-22-108(4)(a)(II), C.R.S. (2012).

this new location his or her residence. *See Gordon v. Blackburn*, 618 P.2d 668, 672 (Colo.1980) (physical presence not required to establish legal residence; and "the intent of the individual is an important element in the problem which cannot be ignored and much intent can only be inferred from acts and declarations").

The defendant acknowledges that the registration scheme is designed to require registration in nontraditional circumstances due, in part, to the transient nature of some registrants. *See People v. Allman*, 2012 COA 212 (the General Assembly did not intend the Act to limit a "residence" to a traditional house or apartment and it may include a motor vehicle). The overall scheme demonstrates an intent to require registration information *before* a registrant moves to a new residence followed by immediate registration in the new location, and the incorporation of a rigid requirement of physical presence or occupancy (not mentioned in the Act) is contrary to the overall structure of the Act. *People v. Swain*, 959 P.2d 426, 429 (Colo. 1998) (a construction of a statute must be avoided that would defeat an obvious purpose of the

statute); *Wilczynski v. People*, 891 P.2d 998, 1001 (Colo. 1995) (a statute should be read and considered as a whole and should be interpreted to give consistent, harmonious, and sensible effect to all its parts).[8]

The defendant contends that the People's reading of the statute would render § 18-3-412.5(1)(g), C.R.S. (2011) superfluous because subsection (a) of this statute and subsection (g) would both criminalize acts involving an intent to establish a residence (Answer Brief, pp. 38-39). It appears that the defendant is now arguing that he could have been charged under the "intent to establish a residence" provision if he had been charged under subsection (a) but that (g) requires residence based on physical presence or occupancy in the residence for failure to

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[8] The defendant asserts that if the People are correct, the notice provision of the statute directed at informing the defendant of the duty to register where the person resides would be inadequate and violate due process. First, this notice issue is not before this Court. Second, the People disagree that affirmative notice of the obligation to register is required by due process. *See*, *e.g.*, *United States v. Elkins*, 683 F.3d 1039, 1049-1050 (9th Cir. 2012); *United States v. Shenandoah*, 595 F.3d 151, 159-160 (3d Cir. 2010). Under the statute, not all persons required to register are given affirmative notice of the duty. Third, as the People argue, the obligations of registration are outlined in the statute making clear the duty to notify law enforcement where a defendant *will reside* in the future.

register. This appears to be contrary to the defendant's position that physical presence or occupancy is always required for a dwelling to constitute a residence under the registration laws.

In any event, assuming *arguendo* that the listed methods of committing the offense do overlap, this does not render the statutory language superfluous. Instead, the legislature provided a list of methods of violating the Failure to Register law beginning with a broad more general provision followed by delineated methods of committing the offense. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (overlap between statutory provisions does not render one superfluous); *see Platt v. People*, 201 P.3d 545, 548 (Colo. 2009) (criminal conduct may properly fall under more than one provision).

The defendant contends that the Act does not provide a seamless registration system and points to the absence of a specific time period in which to register following a change of address under the statute as it existed when the defendant failed to register. This, the defendant claims, demonstrates a gap in the registration system. However, §16-22-108(3)(a), C.R.S. (2007) provides that requires that a registrant

register "each time such person … [c]hanges such person's address. Further, the Failure to Register statute provides that failure to register "upon changing an address" violates the statute. Section 18-2-412.5, C.R.S. (2010). Thus, the triggering event is the changing of address, and the duty to register is immediate.

The defendant finally contends that the People rely on mere intent by a registrant to make a place a future residence as constituting the establishment of a residence. However, as stated in the Opening Brief, the People agree that mere intent is insufficient, but disagree that this means that physical presence in or occupancy of the dwelling is required to establish a residence (Opening Brief, pp. 42-43). Instead, the plain language of the Registration Act provides that "'residence' means a place or dwelling that is … intended to be used … for habitation by a person who is required to register." §16-22-102(5.7), C.R.S. (2011). Further, a "person establishes a residence through an intent to make any place or dwelling his or her residence." §16-22-105(3). Finally, an intent to establish a residence may be proven by evidence short of actual physical presence or occupancy. §16-22-105(3).

The registration laws do not expressly require evidence of physical presence or occupancy to establish a residence for purposes of registering. And such a restrictive standard is simply not required. *See Gordon v. Blackburn*, 618 P.2d at 672 (physical presence not required to establish legal residence; and "the intent of the individual is an important element in the problem which cannot be ignored and much intent can only be inferred from acts and declarations").

III. The evidence was sufficient to support the defendant's conviction for the continuing offense of Failure to Register as a Sex Offender. (Issue II)

As set forth in the People's Opening Brief, the evidence was sufficient to support the conviction for Failure to Register as a Sex Offender. This is true even under the Court of Appeals opinion requiring physical presence or occupancy.

The evidence demonstrated that the defendant provided the Adams County address when he deregistered, that he established this address as his mailing address, and the he identified it as his previous address when he ultimately returned to Colorado and reregistered. The

trial court found the defendant's explanation for his failure to register not credible. The evidence was more than sufficient to support the conviction.

Additionally, the defendant was charged with failure to register with the local law enforcement in each jurisdiction where he resided upon changing his address between June 2, 2006 and February 27, 2007 (v. I, pp. 2, 6; Opening Brief, pp. 4-5). This provision was broad enough to encompass the defendant's continuing failure to register and put him on notice. *People v. Lopez*, 140 P.3d 406 (Colo. App. 2005). At most, there was a variance from the original charge. *Lopez*.

The evidence amply supported the conviction.

CONCLUSION

For the foregoing reasons and authorities, and those in the Opening Brief, the Court of Appeals should be reversed and the judgment of conviction should be upheld.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within REPLY BRIEF upon ELIZABETH PORTER-MERRILL, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on March 7, 2014.

/s/ C. D. Moretti

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