68662-3-I

FILED
October 28, 2015
Court of Appeals
Division I
State of Washington

NO. 68662-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL THREADGILL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Cheryl Carey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED THREADGILL'S RIGHT TO A SPEEDY TRIAL.

The State acknowledges the relevance of diligence to a motion to continue trial, but downplays its significance. See Brief of Respondent, at 23, 26 (conceding it must be considered, but noting such a motion could be granted even where prosecution did not act diligently).

It is not Threadgill, however, that elevated the significance of diligence in this case. It is the trial court, which expressly cited the State's inability to obtain Davis' DNA any earlier, i.e., no lack of diligence, as one of two reasons for its decision to grant a continuance over the defense objection. Specifically, the court found, "the taking of the DNA sample could not have reasonably occurred earlier." 7RP 20.

For the reasons discussed in Threadgill's opening brief, the court's diligence finding fails for lack of evidence. Prosecutors conceded they neglected to ask for a sample of Davis' DNA prior to October 2011. See 7RP 8. And Davis' own attorney, David Gehrke, made it clear in his sworn and unrefuted declaration that prosecutors merely had to ask for such a sample at any time during

the six months preceding their motion to continue Threadgill's trial. CP 295-296. The evidence surrounding events prior to November 2011 belies the court's finding of diligence.

Similarly, the evidence undermines the trial court's second articulated reason for the continuance – the State's claimed realization, after reading the defense trial brief, that defense counsel were focusing on Davis as a suspect. 7RP 21. The defense had made this focus apparent for a long time, and prosecutors were forced to concede prior knowledge. See 7RP 4-5, 11-16. As noted in the opening brief, prosecutors obtained Davis' DNA (October 28) and sent it to the lab (October 31) even *before* the defense filed the briefing that allegedly convinced them of the necessity of the test results on Davis' DNA. See 6RP 17; 7RP 5; CP 13-17, 82-221. Nothing in the defense briefing, which merely confirmed a *continued* focus on Davis, warranted a trial delay.

The State cites two cases as supporting its position: State v. Cauthron, 120 Wn.2d 879, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997), and State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005). Brief of Respondent, at 24-25. Neither case is helpful to the State.

In Cauthron, the Supreme Court merely noted that the continuances requested by the State had been necessary without any discussion of the underlying circumstances. Cauthron, 120 Wn.2d at 910. Whatever the circumstances in Cauthron, however, the circumstances in Threadgill's case are that the State could have obtained Davis' DNA and sent it off for testing six months earlier than it did. All it had to do was ask for a sample.

In Flinn, the defense obtained two trial continuances designed – at least in part – to provide sufficient time to evaluate a potential diminished capacity defense. Flinn, 154 Wn.2d at 196. The same day the defense requested and obtained a third continuance, this time for 19 days, the defense notified the prosecution of its intent to present a mental defense and provided a report from the defense-retained expert. Id. Nineteen days later, the State obtained a continuance necessary to review materials on which the defense expert had relied, interview the expert, and arrange for its own expert to evaluate Flinn. Id. at 197. On appeal, the Supreme Court found this continuance justified. Id. at 200-201.

Flinn is correctly decided under its facts. There is no indication the prosecution in that case knew of Flinn's intent to pursue a mental defense until 19 days before trial, when the

defense gave notice of the defense and identified its expert witness. Continuing trial at the State's request was reasonable in light of the relatively late defense notice and all tasks necessary to meet the defense evidence, including an additional evaluation by a prosecution expert. These circumstances bear little resemblance to Threadgill's case, where the State knew early in the case the defense would argue Davis was involved in Walstrand's murder. To begin the process of responding to that argument, prosecutors merely had to ask Davis for a DNA sample and have it tested, tasks that could have been completed long before the November 2011 trial date. Unlike Flinn, there was no justifiable reason to ask for a continuance on the eve of trial.

Under CrR 3.3(f)(2), a trial court is required to place on the record the reasons for a continuance. The trial court did so in Threadgill's case. Because both of those reasons fail, the court abused its discretion. Reversal is required.

2. THE STATE VIOLATED THREADGILL'S CONSTITUTIONAL RIGHTS WHEN IT PRESENTED EVIDENCE THAT HE DID NOT CONSENT TO A SEARCH OF HIS CELL PHONE AND RECORDS OF HIS CALLS.

In State v. Gauthier, 174 Wn. App. 257, 263-267, 298 P.3d 126 (2013), this Court held that the State's use of evidence that the

defendant failed to consent to a search, in contrast to the cooperation of another suspect, violated his due process rights and protections under the Fourth Amendment and article 1, section 7. Moreover, the issue could be raised for the first time on appeal under RAP 2.5(a)(3) as manifest constitutional error. The State seeks to distinguish Gauthier because prosecutors did not directly make such a comparison during closing argument at Threadgill's trial. See Brief of Respondent, at 29-32.

This Court should reject the suggested distinction. While prosecutors at Threadgill's trial did not expressly contrast Threadgill's conduct with any other witness during closing arguments, prosecutors had already made that contrast apparent while examining their witnesses. During their direct examination of forensic investigator Chuck Pardee, the following exchange occurred:

> Q: Now in reviewing the phone records or the phones for Ms. McMillon-Cooper and Mr. Threadgill, was that pursuant to a court order?
>
> A: Yes.
>
> Q: What about the records or the phone for Mr. Davis?
>
> A: It was consent.

Q: Mr. Davis' consent?

A: Correct.

25RP 29-30.

In addition, prosecutors also had a detective testify to Davis' cooperation. 22RP 37. And they had a different detective repeat for jurors the fact phone records for McMillon-Cooper and Threadgill were obtained only after securing search warrants from a judge. 26RP 59-61.

This testimony is the functional equivalent of the prosecutor's closing argument in Gauthier contrasting his lack of cooperation with the cooperation of another suspect. Even without an explicit use of the comparison during closing argument, jurors would have understood that, unlike Davis (whom prosecutors did not suspect was involved in the crime), Threadgill and McMillon-Cooper (whom prosecutors believed were involved in Walstrand's murder) did not consent to review of their phone records. Instead, law enforcement used court orders, orders that would have been unnecessary otherwise. As in Gauthier, the message to jurors was that the true culprits had something to hide. And, as in Gauthier,

the State's error was both constitutional and sufficiently prejudicial to be manifest.[1]

As argued in Threadgill's opening brief, if this Court finds the error waived based on defense counsels' failure to object, that failure denied Threadgill his constitutional rights to effective representation and a fair trial. See Brief of Appellant, at 31-34. In response, the State argues counsel may not have objected as a tactic and, in any event, there is no reasonable probability this evidence impacted the outcome at trial. See Brief of Respondent, at 36-37.

Permitting jurors to use evidence of Threadgill's exercise of constitutional rights against him at trial is not a tactic, much less a legitimate one, where the contrast between a court order for Threadgill and voluntary consent from Davis would have been quite apparent to Threadgill's jury. Objecting to this improper

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[1] It is this direct comparison – through witness testimony – between Threadgill and McMillon-Cooper on the one hand, and Davis on the other, which also distinguishes this case from those involving a "mere reference" to a constitutional right. See Brief of Respondent, at 31-32 (citing State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008); State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014)).

comparison would not have resulted in any additional harm to the defense.

Moreover, in a case where there was no physical evidence tying Threadgill to the murder, someone else's DNA was found precisely where law enforcement believed the killer's DNA would be located, and witnesses to the crime either agreed to testify against Threadgill to benefit themselves (McMillon-Cooper) or initially denied any knowledge of events before denying their own involvement and pointing the finger at Threadgill (Mohamed and Kerow), there is reason to find this evidence impacted the jury's verdict.

Whether as manifest constitutional error or ineffective assistance of counsel, evidence establishing that Threadgill did not consent to searches for which he was under no obligation to consent denied him a fair trial.

3. THE JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL.

In his opening brief, Threadgill argued WPIC 4.01, which defines reasonable doubt as "one for which a reason exists," is unconstitutional because it requires jurors to articulate a reason for their doubt. Brief of Appellant, at 34-44. In response, the State

argues the Washington Supreme Court has previously upheld this instruction and further asserts the "fill-in-the-blank" cases are inapposite here. Brief of Respondent, at 40-46. The State is incorrect for several reasons.

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. This fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759. Simply put, "a jury need do nothing to find a defendant not guilty." Id.

But the improper fill-in-the-blank arguments were not the mere product of invented malfeasance. The offensive arguments did not originate in a vacuum – they sprang directly from WPIC 4.01's language. In State v. Anderson, for example, the prosecutor explicitly

recited WPIC 4.01 before making the fill-in-the-blank argument: "A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The same occurred in State v. Johnson, where the prosecutor told jurors "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

These misconduct cases make clear that WPIC 4.01 is the true culprit for the impermissible fill-in-the-black arguments. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same pitfall?

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity, that is not the correct standard for measuring the adequacy of jury instructions. Courts have an arsenal of interpretive tools at their disposal; jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a

reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, supports this conclusion.

In State v. Kalebaugh, the supreme court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." 183 Wn.2d 578, 585, 355 P.3d 253 (2015). That conclusion is sound:

> Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction, "a reasonable doubt is such a doubt as the jury are able to give a reason for").

b. No appellate court in recent times has directly grappled with the challenged language.

In Bennett, the supreme court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In Emery, the court contrasted the "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d at 759. In Kalebaugh, the court contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" 183 Wn.2d at 584. The court concluded that the trial court's erroneous instruction – "a doubt for which a reason can be given" – was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Id. at 585.

The court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt.

Jurors likewise are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their reasonable doubt. WPIC 4.01 requires jurors to articulate to themselves or others a reason for having a reasonable doubt. No Washington court has ever explained how this is not so. Kalebaugh did not provide an answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case.

None of the appellants in Kalebaugh, Emery, or Bennett argued that the language requiring "a reason" in WPIC 4.01 misstates the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which there is a reason with a doubt for which a reason can be given.

Forty years ago, the Court of Appeals addressed an argument that "'[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists' (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instructions). Thompson brushed aside the articulation argument in one sentence, stating "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Id. at 5.

That cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts

must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors," but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5. In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. 54 Wn.2d at 291. Nabors cites Tanzymore as its support. 8 Wn. App. at 202. Neither case specifically addresses the doubt "for which a reason exists" language in the instruction. There was no challenge to that language in either case, so it was not an issue.

Thompson observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wn. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following instructional language: "It

should be a doubt for which a good reason exists." 25 Wn. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342). Id. This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.

So Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason be given for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01's doubt "for which a reason exists" language means a doubt for which a reason can be given. That is a problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Emery, 174 Wn.2d at 759-60; Kalebaugh, 183 Wn.2d at 584-585.

State v. Harsted, 66 Wn. 158, 119 P. 24 (1911) further illuminates the dilemma. Harsted took exception to the following instruction: "The expression 'reasonable doubt' means in law just what the words imply -- a doubt founded upon some good reason."

Id. at 162. The Supreme Court explained the phrase "reasonable doubt" means:

> [I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given.

Id. at 162-63. In support of its holding that there was nothing wrong with the challenged language, Harsted cited a number of out-of-state cases upholding instructions that defined a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated in one of these decisions, "[a] doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (Wis. 1899). Harsted noted some courts disapproved of the same kind of language, but was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wn. at 165.

Here we confront the genesis of the problem. Over 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a

reason can be given. This revelation demolishes the argument that there is a real difference between a doubt "for which a reason exists" in WPIC 4.01 and being able to give a reason for why doubt exists. The supreme court found no such distinction in Harsted and Harras.

The mischief has continued unabated ever since. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. This is apparent because the supreme court in Emery and Kalebaugh, and numerous Court of Appeals decisions in recent years, condemn any suggestion that jurors must give a reason for why there is reasonable doubt. Old decisions like Harras and Harsted cannot be reconciled with Emery and Kalebaugh. The law has evolved. What seemed acceptable 100 years ago is now forbidden. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. That requirement distorts the reasonable doubt standard to the accused's detriment.

d. This manifest constitutional issue is properly before this Court.

Although defense counsel did not object below to the instruction on reasonable doubt, the issue may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). As discussed in Threadgill's opening brief, structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). See Brief of Appellant, at 43-44 at n.8; see also State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012) (structural error is manifest constitutional error).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Sullivan, 508 U.S. at 279-80. Indeed, where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence and shifts the burden of proof. Instructing jurors with WPIC 4.01 is both structural and manifest constitutional error.

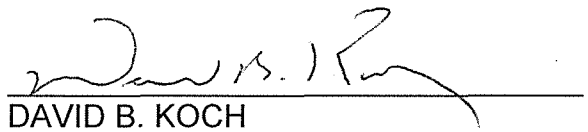
B. CONCLUSION

For all of the reasons discussed in Threadgill's opening brief and above, this Court should reverse his conviction.

DATED this 28th day of October, 2015.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68662-3-I
	)	
DANIEL THREADGILL,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF OCTOBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANIEL THREADGILL
DOC NO. 357673
WASHINGTON STATE PENITENTIARY
1313 N.13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF OCTOBER 2015.

X Patrick Mayovsky