74144-6

FILED
July 1, 2016
Court of Appeals
Division I
State of Washington

No. 74144-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

IVORY TYQUAN BUTLER,

Appellant.

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

The Honorable Monica J. Benton

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Ivory Butler was charged with a count of Promoting Commercial Sexual Abuse of a Minor. The trial court admitted over Mr. Butler's objection hearsay evidence in violation of the statute governing the admission of business records. In addition, during N.C.'s testimony, an additional deputy was placed near Mr. Butler, which could have led the jury to believe Mr. Butler was a violent person who might try to harm N.C. during her testimony. Mr. Butler asks this Court to reverse his conviction and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The admission of the Backpage hearsay evidence by declaration of the custodian of records without advance notice was a violation of RCW 10.96.030.

2. The increased courtroom security violated Mr. Butler's constitutionally protected rights to the presumption of innocence and to a fair trial.

3. The trial court erred in failing to declare a mistrial where increased security before the jury prejudiced Mr. Butler.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 10.96.030 allows for the admission of business records by declaration of the custodian of records provided that sufficient advance notice of the intent to rely on the declaration is given to the opposing party. Here, no such advance notice was given. Did the trial court err in admitting the hearsay exhibits by declaration in violation of RCW 10.96.030 requiring reversal of Mr. Butler's conviction?

2. A defendant has the constitutional rights to the presumption of innocence and a fair trial. Oppressive security in the courtroom at trial that is inherently prejudicial denies one those rights. Was the additional deputy stationed near Mr. Butler only for the testimony of the complainant inherently prejudicial, and did the trial court err in failing to grant a mistrial for a violation of Mr. Butler's rights to the presumption of innocence and a fair trial?

D. STATEMENT OF THE CASE

Twenty-four year old Ivory Butler met 15 year old N.C. in November 2014. RP 669-71. N.C. admitted she had a crush on Mr. Butler and the two began spending time together. RP 671. N.C. was having trouble at home with her mother, and she liked Mr. Butler

because he was nice to her. RP 672. Mr. Butler and N.C. would often text each other. RP 672.

One day, Mr. Butler and N.C. skipped school and went to "hang out" at the Barnes & Noble Bookstore in Federal Way. RP 674. When N.C.'s mother discovered her daughter had not gone to school and had been with a young man, she was angry at N.C. and gave her a "whooping." RP 675. This made N.C. angry and she texted Mr. Butler telling him she wanted to run away from home. RP 676. Mr. Butler told N.C. she could run away with him and that he would pick her up. RP 676-77. N.C. told Mr. Butler she would run away from home on Saturday, December 6, 2014. RP 677.

Still angry with her mother, on December 6, N.C. packed some clothing and met Mr. Butler, and the two went to the New Horizon Hotel in SeaTac, where they had sex. RP 679-84. N.C. wanted to be Mr. Butler's girlfriend. RP 684.

According to N.C., at the hotel, Mr. Butler took pictures of her in her underwear. RP 682. She claimed Mr. Butler gave her a cellphone to use to communicate with him, gave her condoms and, instructed her to have sex with three different men that day for money, which she gave to Mr. Butler. RP 685-89.

Later that day, the police found N.C. in the hotel room and took her into custody. RP 691. At the station, N.C. told the police that a woman named Aliyah, not Mr. Butler, had directed her actions as a prostitute, a statement she later recanted at trial. RP 691.

Mr. Butler was subsequently charged with one count of Promoting Commercial Sexual Abuse of a Minor. CP 1. At his trial, the State sought to admit copies of photographs of a scantily clad N.C. and correspondence allegedly made by Mr. Butler regarding a post on Backpage as a business record, but without having the custodian of records appear and testify. CP Supp ___, Sub No. __ Exhibit 5; RP 346. Mr. Butler objected, arguing the records were hearsay and violated his right to confrontation, and also that the State had failed to provide the proper notice for admitting the records without the testimony of the custodian of records. RP 346-50, 425-31. The trial court overruled Mr. Butler's objections and admitted the Backpage exhibits. RP 475.

At the conclusion of N.C.'s direct testimony, Mr. Butler moved for a mistrial, noting that during N.C.'s testimony, an additional deputy was placed directly behind defense counsel:

> One of them came up right behind me, sat behind me, being in such a way as to make it obvious to the jurors that he was shielding the witness from my client. And I

> wish I would have been consulted about this before we did that.
> . . .
> I think this is just as prejudicial as seeing someone in shackles. I think that the message to the jury was this guy is dangerous. He needs -- we need extra staff. Not only extra staff, but we need extra staff sitting really close to him so they can pounce on him if he does anything crazy.
> . . .
> The clear message to the jurors was that Mr. Butler is so dangerous that he will leap over a counsel table and attack the witness. I don't think that there's any possible innocent conclusion that the jurors could have drawn from what we saw in the courtroom. And I did bring my motion at the earliest opportunity.

RP 694, 705.

> The trial court denied the motion for mistrial:
>
> The presence of the second officer, in the Court's view, was an unnecessary precaution that the Department of Corrections or the jail chose to exercise on its own. There's no record -- no facts in this record that suggests that that decision was made in advance, advising the Court or either of the parties, so the Court couldn't anticipate in the way that the Holbrook Court was able to anticipate the concern of prejudice.
> . . .
> Very little that happened with the second officer entering the courtroom the Court believes created any sort of alarm for dangerousness by the defendant or even particular tension in the courtroom, and the Court treated it as though it were routine. The defense didn't raise a motion to alert the Court to any prejudice or possible prejudice that they believe it produced. The officer was unobtrusive. He sat directly in front of the witness stand but some 20 feet away. He was eight feet away from the defendant -- I would say that's a fair estimate -- and six

> from the defense counsel. He was in a position to prevent any harm, but he also was not obtrusive. No weapon was displayed. There was no fidgetiness. There was nothing to suggest that this was anything other than just another security measure.

RP 714-17. Despite Mr. Butler's argument that the taint to the trial from this action by the deputy could not be cleansed, the court nevertheless agreed to give a curative instruction. RP 716-17. The curative instruction was included with the other instructions. CP 48.

Mr. Butler was convicted as charged. CP 38.

E. ARGUMENT

1. **The Backpage evidence was not admissible as the State as proponent did not comply with RCW 10.96.030.**

    a. *Business records are not admissible without the testimony of the custodian of records where the proponent fails to comply with RCW 10.96.030.*

Business records are admissible under an exception to the hearsay rule, codified at RCW 5.45.020, which provides:

> *Business records as evidence.* A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

It is not necessary that the person who actually made the record provide the foundation. *State v. Quincy*, 122 Wn.App. 395, 399, 95 P.3d 353, 354-55 (2004), *review denied*, 153 Wn.2d 1028 (2005). "Testimony by one who has custody of the record as a regular part of his work or has supervision of its creation ('other qualified witness' under the statute) will suffice." *State v. Ben-Neth*, 34 Wn.App. 600, 603, 663 P.2d 156 (1983).

RCW 10.96.030 allows admission of business records by affidavit or declaration without the testimony of the custodian where certain conditions are met:

> The requirements of RCW 5.45.020 regarding business records as evidence may be satisfied by an affidavit, declaration, or certification that complies with subsection (2) of this section, without the need for testimony from the custodian of records, regardless of whether the business records were produced by a foreign or Washington state entity.
>
> In order to be admissible under RCW 10.96.030,
>
> [a] party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties, and must make the record and affidavit, declaration, or certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

RCW 10.96.030(3).

b. *The State as proponent failed to provide adequate notice as required by RCW 10.96.030, thus the evidence was inadmissible absent testimony from the custodian of records.*

Here, the State failed to provide any advance notice of its intent to admit the Backpage evidence by declaration of the custodian. All that the State did was to turn over its discovery pretrial; the State did not provide the name of the custodian of records whose declaration it ultimately provided at trial:

> The other thing is the State never identified the custodian of record for Backpage, which is -- his name is written on State's Exhibit 5, or typed in, rather, it's Nathan Yockey, Y-o-c-k-e-y.

RP 430.

The trial court found the fact the documents were provided as part of discovery was sufficient notice. RP 428-29.

While there is no current caselaw defining the notice requirement of RCW 10.96.030, an analogy can be made to the child hearsay rule under RCW 9A.44.120, which requires similar notice prior to moving for its admission:

> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse

> party with a fair opportunity to prepare to meet the statement.

The history of this rule indicates it arises out of the "catch-all" exception of the Federal Rules of Evidence. *See* Fed.R.Evid. 807; *State v. Lopez*, 95 Wn.App. 842, 850-51, 980 P.2d 224 (1999).[1] In *United States v. Pelullo*, the Third Circuit ruled that giving notice of the hearsay statement in discovery was insufficient for admission under this catch-all provision because notice of the intention to rely on this specific ground for admissibility was required. 964 F.2d 193, 202 (3rd Cir. 1992).

Following the logic in *Pelullo*, by providing Mr. Butler with the Backpage evidence, the State did not comply with the notice requirement in RCW 10.96.030. The State was required to do more; inform Mr. Butler that it intended to rely on RCW 10.96.030 for admission. *Pelullo*, 964 F.2d at 202. This would have allowed Mr. Butler to object or interview the custodian of records, thus allowing

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[1] Fed.R.Evid. 807 provides in relevant part:

> (b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

him “a fair opportunity to challenge [the evidence]” as required by RCW 10.96.030(3).

Given the lack of guidance regarding the notice required for admission of hearsay evidence under RCW 10.96.030(3), this Court should adopt the logic of the federal courts regarding the Federal Rules of Evidence rule 807 notice requirement. Under this rule the State was required to give notice to Mr. Butler it was relying on RCW 10.96.030 for admission of the Backpage evidence. The failure to provide this notice was error under RCW 10.96.030 and admission of the Backpage evidence should be reversed.

c. *The error in admitting the Backpage evidence without sufficient notice was not harmless.*

Evidentiary errors are prejudicial where, within reasonable probabilities, the trial’s outcome would have differed had the error not occurred. *State v. Thomas,* 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

While there was evidence that N.C. engaged in sexual activity for money, the only evidence that Mr. Butler was dictating N.C.’s actions came from N.C.; there was little or no corroborating evidence. In fact, as stressed throughout the trial, when the police first contacted N.C., she stated that Mr. Butler was *not* involved. The Backpage evidence, while ambiguous at best regarding whether Mr. Butler was in

charge of N.C. actions, lends some credence to N.C.'s subsequent story, and was used by the State as evidence to bolster her in-court claims. RP 881. This was extremely important because N.C.'s credibility was the issue at trial given the dearth of evidence showing Mr. Butler directed N.C. as opposed to N.C. voluntarily engaging in the activities, or doing so at Aliyah's behest.

The error in admitting the Backpage evidence was not a harmless error and Mr. Butler's conviction should be reversed.

2. **The intensified and oppressive security during N.C.'s testimony violated Mr. Butler's rights to the presumption of innocence and to a fair trial.**

a. *Actions by the trial court that are "inherently prejudicial" violate the right to a fair trial.*

The Defendant enjoys the fundamental right to a fair trial. U.S. Const. amends. VI and XIV; Const. art. I, § 22. The United States Supreme Court has held that "[c]entral to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), *quoting*

Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). This presumption of innocence is considered a basic component of a fair and impartial trial in our criminal justice system. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). "Courtroom practices that unnecessarily mark the defendant as dangerous or guilty undermine the presumption of innocence." *State v. Flieger*, 91 Wn.App. 236, 240, 955 P.2d 872 (1998), *review denied*, 137 Wn.2d 1003 (1999).

A defendant is "entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Any measures that "single out" a defendant as a particularly dangerous or guilty person threaten his constitutional right to a fair trial. *Id*. In particular, courts have universally held that the appearance of restraints should "be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape." *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

But the issue here is not whether the State physically restrained Mr. Butler in front of the jury, but whether the presence of the additional deputy stationed near Mr. Butler after the trial had started and only during the testimony of N.C. was inherently prejudicial. Thus, the question is whether "'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook*, 475 U.S. at 570, *quoting Estelle v. Williams*, 425 U.S. at 505. "A courtroom practice might present an unacceptable risk of impermissible factors coming into play because of 'the wider range of inferences that a juror might reasonably draw' from the practice." *State v. Jaime,* 168 Wn.2d 857, 862, 233 P.3d 554 (2010), *quoting Holbrook*, 475 U.S. at 569.

In *Holbrook,* the defendant claimed that he was prejudiced by the placement of four uniformed state troopers in the first row of the courtroom's spectator section at his trial. 475 U.S. at 570-71. The Supreme Court disagreed, concluding that, "we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section" and that "[f]our troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." *Holbrook*, 475 U.S. at 571. However, the *Holbrook*

Court did not foreclose the possibility that, under certain circumstances, deployment of security guards could violate a defendant's constitutional right to receive a fair trial: "In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate." 475 U.S. at 569.

The defendant need only show the security arrangement was inherently prejudicial and is not required to show that jurors "actually articulated a consciousness of some prejudicial effect." *Jaime*, 174 Wn.2d at 864 n.4, *quoting Holbrook*, 475 U.S. at 570.

b. *The addition of a second deputy only for N.C.'s testimony was inherently prejudicial.*

"When a defendant's constitutional right to a fair trial has been violated and he moves for mistrial, the motion should be granted." *State v. Rodriguez*, 146 Wn.2d 260, 273, 45 P.3d 541, 547 (2002).

The trial court here relied upon the decision in *Holbrook* to find the additional deputy was not inherently prejudicial and that it was "just another security measure." RP 716. But *Holbrook* is merely the beginning; one needs to consider the Washington Supreme Court's decision in *Jaime, supra*, as well.

In *Jaime*, the trial of the defendant took place in a secure courtroom in the jail. 168 Wn.2d at 860-61. The Supreme Court

reversed the resulting convictions, finding the setting infringed on the defendant's right to a fair and impartial trial. *Id.* at 867. Analyzing the issue under *Holbrook*, the Court framed the issue as whether the trial inside the jail was inherently prejudicial, i.e., whether the average juror would be influenced adversely to the defendant. *Id.* at 862-63. The Court noted that in *Holbrook*, the United States Supreme Court did not focus its inquiry into the *arrangement* of the guards, but merely the presence of the guards in general. *Id.* at 863. The Washington Supreme Court ruled the setting for the defendant's trial was inherently prejudicial because it was not held in a court house but a jail which had "a purpose and function that is decidedly not neutral, routine, or commonplace." *Id.* at 864.

Thus, the question here is not whether the mere presence of the additional guard was inherently prejudicial, but whether the particular arrangement of the guard and how that might be viewed by the average juror was inherently prejudicial. Mr. Butler's counsel summed up the inherent prejudice in his argument to the court:

> I think this is just as prejudicial as seeing someone in shackles. I think that the message to the jury was this guy is dangerous. He needs -- we need extra staff. Not only extra staff, but we need extra staff sitting really close to him so they can pounce on him if he does anything crazy.
> . . .
> The clear message to the jurors was that Mr. Butler is so dangerous that he will leap over a counsel table and attack the witness. I don't think that there's any possible innocent conclusion that the jurors could have drawn from what we saw in the courtroom. And I did bring my motion at the earliest opportunity.

RP 694, 704.

There was no evidence that Mr. Butler had been any security concern; no evidence he had made threatening gestures, had been obstreperous or exhibiting any negative behavior at trial, which the trial court highlighted in its decision. In order to justify additional restraints or security, there must be "specific facts relating to the individual" that justify the additional restraint. *Jaime*, 174 Wn.2d at 866, *quoting Hartzog*, 96 Wn.2d at 399-400. Here there was nothing that would lead to the need for additional security. The additional security was inherently prejudicial and Mr. Butler's conviction must be reversed.

c. *The curative instruction was an inadequate remedy ion light of the prejudice suffered by Mr. Butler.*

"A'bell once rung cannot be unrung.'" *State v. Easter,* 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996), *quoting State v. Trickel,* 16 Wn.App. 18, 30, 553 P.2d 139 (1976).

Here, despite the trial court's attempt to cure the error with a jury instruction, the damage had been done. The jury could not "unsee" the increased security near Mr. Butler when N.C. testified. The curative instruction was an inadequate remedy and Mr. Butler's conviction should be reversed.

3. **This Court should order that no costs be awarded on appeal.**

a. *Mr. Butler may seek an order from the Court ordering that no costs be awarded in his Brief of Appellant.*

Should this Court reject Mr. Butler's argument on appeal, he asks that this Court to issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency. Such as request is authorized under this Court's recent decision in *State v. Sinclair,* 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails,

the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair*, 192 Wn.App. at 388, *quoting Nolan*, 141 Wn.2d at 628.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an "individualized inquiry." *Id*. at 391, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

One factor this Court found persuasive in making its determination regarding costs on appeal in *Sinclair* were the trial court's findings supporting its order of indigency for the purposes of the appeal pursuant to RAP 15.2. *Sinclair*, 192 Wn.App. at 392-93. Here, the trial court entered the order of indigency and findings supporting its order. As in *Sinclair*, there is no evidence that Mr. Butler's financial situation will improve. *Id*. at 393.

At the time of sentencing, Mr. Butler was 24 years of age. CP 66. Mr. Butler was sentenced to 138 months in custody. CP 63. In light

of the decision in *Sinclair*, given Mr. Butler's indigency and imprisonment, "[t]here is no realistic possibility that [he] will be released from prison in a position to find gainful employment that will allow [him] to pay appellate costs." *Sinclair*, 192 Wn.App. at 393.

Because of his current and continued indigency and likelihood that he will remain so while in prison, Mr. Butler asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

b. *Alternatively, this Court must remand to the trial court for a hearing where the court must determine whether Mr. Butler has the current or future ability to pay.*

Should this Court determine that it cannot make a finding regarding ability to pay because the record is not complete, due process requires this Court to remand to the trial court for a hearing to determine Mr. Butler's present or future ability to pay these costs.

Any award of costs becomes part of the Judgment and Sentence, thus amending that document. RCW 10.73.160 (3) states that: "An award of costs shall become part of the trial court judgment and sentence." A defendant has due process rights where the State seeks to modify or amend a Judgment and Sentence, including:

> (a) written notice (b) disclosure of evidence against him or her; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the court specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body; and (f) a written statement by the court as to the evidence relied on and reasons for the modification.

State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005), *citing Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Since adding any costs that might be requested by the State to Mr. Butler's Judgment and Sentence necessarily amends the judgment, due process requires that there be a hearing which complies with the dictates of *Abd-Rahmann* regarding his present or future ability to pay. As such, Mr. Butler requests that, in the absence of a finding by this Court regarding his ability to pay, this Court remand to the trial court for a hearing on his ability to pay.

F. CONCLUSION

For the reasons stated, Mr. Butler asks this Court to reverse his conviction and remand for a new trial.

DATED this 1st day of July 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74144-6-I
v.	)	
	)	
IVORY BUTLER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF JULY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] IVORY BUTLER 369616 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF JULY, 2016.

X_____

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