

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

FILED
9-26-16

Court of Appeals
Division I
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

RANDALL PAULSON,

Appellant.

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

The Honorable Timothy A. Bradshaw, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The prosecutor improperly commented on appellant's exercise of his constitutional right to silence, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Issue Pertaining to Assignment of Error

Whether the State improperly commented on appellant's constitutional right to post-arrest silence by eliciting and exploiting evidence that appellant did not deny drugs were in his room and did not claim someone else had been in his room during custodial interrogation?

B. STATEMENT OF THE CASE

The State charged Randall Paulson with possession of methamphetamine, a controlled substance. CP 15. The case proceeded to a jury trial, where the following evidence was presented.

On May 26, 2015, police arrested Paulson following a traffic stop. RP¹ 195-96, 315. Detective Halsted read Paulson his Miranda² rights. RP 316-17. Detective Hallifax, testifying for the State, claimed Paulson made certain statements during interrogation. RP 196. Hallifax asked Paulson if he had any drugs in his car. RP 196. Paulson said he didn't. RP 196.

¹ The verbatim report of proceedings is cited as follows: RP - five consecutively paginated volumes consisting of 2/8/16, 2/9/16, 2/17/16, 2/18/16, 2/19/16.

² Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Hallifax asked if he had any drugs in the safe at his house. RP 196. Paulson answered "No, my safe is wide open in my bedroom." RP 196. Hallifax asked where the drugs were. RP 196. Paulson answered "There may be some drugs left on my other nightstand." RP 196. No one else was present when Paulson made this statement. RP 229. Hallifax did not record the statement, though he had the ability to do so. RP 238-39.

A woman named Blake was in the car with Paulson at the time of his arrest. RP 249-50. She had just been released from King County Jail after being incarcerated for a couple of days. RP 250, 256. Officer Sargent was aware Blake was a drug user, and that she used both heroin and methamphetamine. RP 279. She had been arrested a couple months before, at which time methamphetamine was in her purse. RP 282. Sargent asked Blake at scene of Paulson's arrest whether there would be any exposed needles in the house. RP 261. She said any needles in her downstairs room would be kept in a sharps container. RP 261, 278.

Police searched the house immediately after Paulson's arrest. RP 197, 201, 250. The house is a split-level, with three bedrooms in the basement and three bedrooms upstairs. RP 198-99. The house was messy. RP 230-31. Other people lived there as well. RP 230. Police ushered an adult female and some children outside in the course of executing the search. RP 199, 201.

Hallifax was called over to one of the bedrooms. RP 202. There were two nightstands on either side of the bed. RP 203. There was an open safe on one of the nightstands. RP 203. In this nightstand, a meth pipe, some baggies, and paperwork with Paulson's name on it were located. RP 215-16, 232.

On the other side of the bed, police found what appeared to be methamphetamine in another nightstand. RP 203, 211, 267. A forensic scientist later confirmed after testing that the substance was methamphetamine. RP 287, 300, 303. Stamped dime bags were in the nightstand drawer. RP 215, 269, 274-75. Other items were on the nightstand. RP 232-35. No fingerprint or other forensic testing was done on them. RP 235. No mail with Paulson's name on it was found in this nightstand drawer. RP 278

The bedroom was messy. RP 307. There was men's clothing in the room.³ RP 203, 214, 266. Items and clothes were strewn on the bed. RP 231. Mail with Paulson's name on it was scattered on the bed.⁴ RP 203-04, 214. A photo album found in the closet had pictures of Paulson in it. RP 308.

³ Detective Paulsen said they found "mostly" male clothing. RP 307. Officer Sargent could not say for certain whether any women's clothing was present because he did not go through it all. RP 277.

⁴ The postmarks on the documents were not checked for dates. RP 237-38.

There was an enormous amount of clutter in the living room. RP 339. Documents with Paulson's name on them were found there. RP 339-40. Some bankruptcy documents and some checkbooks with Paulson's name on it were found in the TV room of the house. RP 204, 216, 232.

Drug paraphernalia was found in a downstairs bedroom. RP 271. A large number of needles in a sharps container were found downstairs, as Blake said they would be. RP 272. These needles are commonly associated with drug use. RP 236-37, 253. Detective Hallifax said these needles are typically used for heroin, but can be used for methamphetamine. RP 236-37, 254. Officer Sargent acknowledged these types of needles are commonly used for both heroin and methamphetamine use. RP 279. It is common for a person to use both drugs. RP 279. Blake had been arrested a couple months before, at which time methamphetamine was in her purse. RP 282

Immediately after securing evidence obtained from the house, Detective Hallifax interviewed Paulson at the police station. RP 225-26. During direct examination, Detective Hallifax testified that upon contacting Paulson, he asked if he still remembered his rights from when they were given earlier. RP 226. Paulson said yes. RP 226. Hallifax asked if he was still willing to speak. RP 226. Paulson said yes. RP 226. Paulson did not ask for his rights to be repeated and did not express any

confusion about them. RP 226. Hallifax did not threaten, coerce, or promise anything to get Paulson to speak to him again. RP 226. The following exchange then occurred:

Q: Did you tell him what you found at his home?

A: Yes.

Q: Did he ever deny what you found (inaudible)?

A: No.

Q: Did he mention anyone else being in his room?

A: No.

Mr. Dubow: Objection.

The Court: Basis?

Mr. Dubow: Based on pretrial rulings,⁵ and rule of completeness.

The Court: Overruled.

Q: Did he ever mention anyone else was in his room?

A: No.

Q: Did he make any statements?

A: Yes. I was asking him several questions, and he repeatedly demanded a Pepsi and a cigarette and he would tell us everything we wanted; but based on the fact that we can't provide bribes, or threats, or promises, or anything like that, I just shut the interview down after the third or fourth time he had asked.

RP 226-27.

In closing argument, the prosecutor returned to this topic:

The second interview that Detective Hallifax had. He went back to the station. He asked Mr. Paulson if he remember [sic] his rights, if he still understood them, if he was still

⁵ This appears to be a reference to the pre-trial ruling excluding some of Paulson's statements under ER 403. RP 125-29; CP73. The excluded statements include he did not use drugs, he did not sell drugs, he knew drug dealers, and that people came over to his house asking for dope, he might have given drugs to people in the past, and he was just trying to help drug addicts when they came over sick. CP 73.

willing to talk; and Mr. Paulson said he was still willing to talk, that he remembered his rights. Detective Hallifax explained to us this morning that he told Mr. Paulson what they had found in the way of methamphetamine. Mr. Paulson didn't deny it. His response: Demanding a Pepsi and a cigarette, and I'll tell you all you want to know. He didn't deny it. He didn't mention, you know what, that's actually not mine; that's someone else's. You know what, actually, there are these two other people that live there that might have drug backgrounds; that's actually [theirs]. He didn't say that. All he did was demand a Pepsi and a cigarette, and say I'll tell you what you want to know if you get me those things. That was his opportunity.

Mr. Dubow: Objection. Improper argument and comment on Fifth Amendment.

The Court: The objection is overruled. The jurors are reminded that the lawyers' arguments are not evidence however, and that the law is given to you in the Court's instructions on the law. You may proceed.

RP 363-64.

The jury returned a guilty verdict. CP 32. The court imposed 110 days in confinement. CP 29. Paulson appeals. CP 52-58.

C. ARGUMENT

1. **THE STATE'S IMPROPER COMMENT ON PAULSON'S EXERCISE OF HIS POST-ARREST RIGHT TO REMAIN SILENT REQUIRES REVERSAL.**

"The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). The State presented

evidence of Paulson's post-arrest silence and then drew an adverse inference in closing argument that Paulson was guilty based on that evidence. In so doing, the State improperly commented on Paulson's partial silence as substantive evidence of guilt. This violated Paulson's right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution. Reversal of the conviction is required because the State cannot show its comment is harmless beyond a reasonable doubt.

- a. **The State impermissibly treated Paulson's silence as substantive evidence of guilt in presenting evidence and argument that Paulson did not deny or explain incriminating evidence during police interrogation following his arrest.**

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); U.S. Const. amend. V; Wash. Const. art. I, § 9. Whenever a criminal suspect is subjected to custodial interrogation, he must be warned of her right to remain silent and informed that any statement he makes can be presented as evidence in court. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Miranda warnings make a suspect's silence "insolubly ambiguous" because that silence could be "nothing more than [an] exercise of these Miranda rights." Doyle v. Ohio, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

The State is forbidden from commenting on a defendant's exercise of the right to silence. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). "Once the suspect is arrested and Miranda rights are read, the State violates a defendant's Fifth and Fourteenth Amendment rights by introducing evidence of his exercise of Miranda rights as substantive evidence of guilt." State v. Curtis, 110 Wn. App. 6, 11-12, 37 P.3d 1274 (2002) (citing Easter, 130 Wn.2d at 236; State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)). "The reason for this is that the government, in reading these rights, implicitly assures the accused that he may assert his rights without penalty." Curtis, 110 Wn. App. at 12 (citing Easter, 130 Wn.2d at 238; Doyle, 426 U.S. at 618-19). "The highly prejudicial suggestion that defendant's post-arrest silence is consistent with guilt . . . can be made just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself." State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

The right against self-incrimination is liberally construed. Easter, 130 Wn.2d at 236. "Even when the State may use a defendant's statements at trial, the suspect may exercise the right to silence in response to any question and the State cannot use that partial silence against him at trial." State v. Fuller, 169 Wn. App. 797, 815, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013). "[T]he right to silence is

not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial." Fuller, 169 Wn. App. at 814-15 (quoting Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010)).

Focusing largely on the purpose of the remarks, reviewing courts distinguish between "comments" and "mere references" to an accused's right to silence. State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wn.2d at 707. A prosecutor's statement on the constitutional right to silence is a mere reference only if the remark was so subtle and so brief that it did not "naturally and necessarily" emphasize the defendant's silence. Burke, 163 Wn.2d at 216 (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

The evidence elicited by the prosecutor in Paulson's case and the prosecutor's exploitation of that evidence in closing argument amounted to a comment on Paulson's exercise of his right to silence. During the second interrogation, Detective Hallifax asked several questions and Paulson repeatedly demanded a Pepsi and a cigarette and "he would tell us

everything that we wanted." RP 227. Paulson invoked his right to partial silence in not denying what police found in his room and in not saying anything about whether anyone else was in his room. Fuller, 169 Wn. App. at 816. The prosecutor explicitly focused the jury's attention on evidence of Paulson's post-arrest silence in arguing the jury should find him guilty.:

Detective Hallifax explained to us this morning that he told Mr. Paulson what they had found in the way of methamphetamine. Mr. Paulson didn't deny it. His response: Demanding a Pepsi and a cigarette, and I'll tell you all you want to know. He didn't deny it. He didn't mention, you know what, that's actually not mine; that's someone else's. You know what, actually, there are these two other people that live there that might have drug backgrounds; that's actually [theirs]. He didn't say that. All he did was demand a Pepsi and a cigarette, and say I'll tell you what you want to know if you get me those things. That was his opportunity. RP 363.

The prosecutor relied on Paulson's failure to respond as evidence of guilt in closing argument. The State cannot use a suspect's post-arrest silence as substantive evidence of guilt. Fuller, 169 Wn. App. at 816. That is what happened here.

Several cases are instructive. In Fuller, the trial court allowed the State to elicit testimony from the interrogating officer that Fuller did not deny being in a surveillance video that put him at the scene of the crime and did not deny his guilt. Id. The prosecutor used his silence when it

commented in opening statement and in closing argument that Fuller never denied being in the video and never denied guilt. Id. That was an impermissible comment on the right to silence. Id.

In State v. Pinson, an officer asked defendant Pinson during interrogation if the fight got physical. State v. Pinson, 183 Wn. App. 411, 415, 333 P.3d 528 (2014). Pinson did not respond. Pinson, 183 Wn. App. at 415. The prosecutor argued the lack of response was evidence of guilt, as an innocent person would have provided a different response when confronted. Id. The State's argument impermissibly treated Pinson's right to silence as substantive evidence of guilt. Id.

In State v. Silva, the defendant Silva answered a few innocuous background questions and then the interviewing detective summarized the incriminating facts surrounding his arrest, inviting a response. State v. Silva, 119 Wn. App. 422, 424, 81 P.3d 889 (2003). Silva remained silent. Silva, 119 Wn. App. at 424. At trial, the detective was permitted to relate the question, the incriminating facts, and Mr. Silva's non-response to the jury. Id. This was an impermissible comment on Silva's exercise of his right to remain silent and a due process violation. Id.

In State v. Knapp, the defendant Knapp testified at trial, denying he committed the charged burglary and asserting an alibi defense. State v. Knapp, 148 Wn. App. 414, 418, 421, 199 P.3d 505 (2009). The

prosecutor elicited a detective's testimony about Knapp's reactions upon being told on two occasions that two witnesses had positively identified him: Knapp immediately hung his head and said nothing in the first instance and displayed no reaction in the second. Knapp, 148 Wn. App. at 419. During closing, the prosecutor argued the jury should find Knapp guilty because, both times when witnesses identified him, "[W]hat did he do? He put his head down. Did he say, 'No. It wasn't me'? [sic] No." Id. at 420 (emphasis omitted). The prosecutor impermissibly commented on Knapp's silence in using it as substantive evidence of guilt. Id. at 421.

As in Knapp, Silva, Pinson and Fuller, Paulson did not deny the accusation when given an opportunity to do so during the course of interrogation. When presented with the incriminating fact that methamphetamine was found in his room, Paulson did not deny it and did not say that someone else had been in his room. The elicitation of this evidence, coupled with the prosecutor's closing argument on the subject, implicates Paulson's right to silence. The prosecutor in closing relied on that evidence in arguing Paulson was guilty.

The law is clear. The State commits error when it uses the defendant's post-Miranda failure to deny an accusation as a tacit admission of guilt. See State v. Holmes, 122 Wn. App. 438, 440, 444-45, 93 P.3d 212 (2004) (testimony that defendant did not act surprised or deny

allegation at the time of his arrest was comment on silence); State v. Terry, 181 Wn. App. 880, 882, 328 P.3d 932 (2014) (testimony that defendant did not question or express surprise over his arrest and prosecutor's argument that this showed he knew he was guilty was comment on silence). Paulson was given Miranda warnings. He did not deny police found methamphetamine in his room and he did not say anyone else was in his room. He was promised that his silence would not be used against him. The State used it against him at trial anyway. That is constitutional error. "For the government to comment on *post-Miranda* silence is to [break] its promises given in the *Miranda* warnings and violate[] due process of law." Terry, 181 Wn. App. at 889 (quoting Burke, 163 Wn.2d at 213). The prosecutor here impermissibly commented on Paulson's silence in using it as substantive evidence of guilt.

b. The error is preserved for review because defense counsel objected to the prosecutor's improper argument and that objection was overruled.

Defense counsel did not object on constitutional grounds to the testimony elicited by the prosecutor that Paulson failed to deny police found methamphetamine in his room and he did not say anyone else was in his room. RP 226-27. There are two ways to look at that. First, this testimony, considered in isolation, is arguably a mere reference to silence rather than a comment. The error unmistakably rose to the level of a

comment on silence when the prosecutor exploited the testimony in closing argument, at which time counsel appropriately objected.

Second, the trial court's overruling of counsel's objection in closing argument shows an earlier objection to the testimony based on that argument would have failed. Viewed from this perspective, the error remains preserved for review on this ground as well. See State v. Cantabrana, 83 Wn.App. 204, 208-09, 921 P.2d 572 (1996) (failure to properly object may be excused where it would have been a useless endeavor); State v. McCreven, 170 Wn. App. 444, 473, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015, 297 P.3d 708 (2013) (error consisting of prosecutor's improper comment preserved for review despite lack of objection where review of the record suggested an objection was unlikely to succeed given the trial court's blanket overruling of all objections during closing argument).

Even where there has been no objection whatsoever, an appellant may challenge an improper comment on the exercise of the constitutional right to silence for the first time on appeal under RAP 2.5(a)(3). State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); Curtis, 110 Wn. App. at 11; Holmes, 122 Wn. App. at 445-46 (direct comment on silence is always a constitutional error; indirect comment of constitutional magnitude where State exploits it). We have an objection here, and the

trial court overruled it. The trial court was given the chance to correct the error and it failed.

c. The State cannot show this constitutional error was harmless beyond a reasonable doubt.

Direct comments on the invocation of the right to remain silent are reviewed under a constitutional harmless error standard. Burke, 163 Wn.2d at 222; Fuller, 169 Wn. App. at 813, 819. The State bears the heavy burden of establishing harmlessness. Fuller, 169 Wn. App. at 813. The error is harmless "only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Terry, 181 Wn. App. at 894.

Evidence of guilt was not overwhelming here. Detective Hallifax testified that Paulson told him drugs may be left in the nightstand. RP 196. Paulson did not identify the drug as methamphetamine and did not say the drugs were his. The statement, taken at face value, shows knowledge of the presence of drugs, not necessarily Paulson's possession of them. Further, there was a basis to question Hallifax's representation of what Paulson said. Hallifax was the only officer present at the time, so there is no corroboration, even though other officers were on the scene. RP 229. Significantly, Hallifax did not record the statement in any way, though he

had the ability to do so. RP 238-39. A reasonable juror could wonder why an officer did not record an incriminating statement and instead opted to rely on his own say-so.

The possession element of the State's case was subject to doubt. Blake was a known methamphetamine user who lived in the house. RP 261, 278-79, 282. Unlike Blake, no evidence was presented that Paulson had ever used methamphetamine in the past. Blake was in the car with Paulson at the time of his arrest, suggesting a relationship between the two. RP 249-50. The jury could have a reasonable doubt that Paulson possessed the methamphetamine in light of Blake, a known methamphetamine user, having access to his bedroom. The State cannot show beyond a reasonable doubt that its comment on Paulson's silence did not sway the jury. Inviting a jury to infer that a defendant is more likely guilty because he exercised a constitutional right "always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial." Silva, 119 Wn. App. at 429.

The prosecutor apparently believed Paulson's post-arrest silence was important enough to emphasize to the jury. RP 363-64. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close

case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). The State cannot now plausibly maintain the error was harmless.

The trial court did not cure the error. It overruled defense counsel's objection to the prosecutor's "[i]mproper argument and comment on Fifth Amendment." RP 363. The court's overruling of counsel's objection "lent an aura of legitimacy to what was otherwise improper argument." State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984); see also State v. Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (effect of improper argument compounded when the court overruled objection, which gave additional credence to the argument).

The court's following statement — "The jurors are reminded that the lawyers' arguments are not evidence however, and that the law is given to you in the Court's instructions on the law" — did nothing to cure the problem. RP 363. The problem is not that the prosecutor's argument was outside the evidence. The objection was to the improper comment on Paulson's right to silence, which the court's instructions do not address in any way. The instructions do not tell the jury whether it can use silence against the accused. By overruling counsel's objection that the prosecutor's argument was improper based on the Fifth Amendment, the trial court effectively conveyed to the jury that the prosecutor's argument

was proper. See also CP 37 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law."). To avoid reversible error, the trial court needed to sustain the objection and tell the jury it could not rely on Paulson's silence as evidence of guilt. That did not happen. The conviction must be reversed.

2. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . *may* require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). The concerns expressed in Blazina are applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

The trial court waived all discretionary costs at sentencing because Paulson lacked the present or future ability to pay them. CP 28; RP 414.

He lost his job due to "the felony" and was not working at the time of sentencing. RP 410, 414. Paulson boasted about his past earnings and predicted he would be reduced to \$30,000-35,000 a year in future income. RP 410. This may have been more bluster than substance. In context, Paulson was likely trying to impress the trial judge. He and his family are on food stamp benefits. CP 62, 66. He otherwise has zero monthly income. CP 62. Paulson qualified for indigent defense services on appeal. CP 59-60. There is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). There is no finding that he will have the ability to pay in the future. Sinclair, 192 Wn. App. at 393. The \$600 in mandatory legal financial obligations that were imposed are subject to a 12 percent annual interest rate. Blazina, 182 Wn.2d at 836.

Considering the circumstances, Paulson asks this Court to soundly exercise its discretion by denying any request for appellate costs. See State v. Cardenas-Flores, 194 Wn. App. 496, 521-22, 374 P.3d 1217 (2016) (waiving appellate costs in light of defendant's indigent status, and presumption under RAP 15.2(f) that she remains indigent "throughout the review" unless the trial court finds that her financial condition has improved).

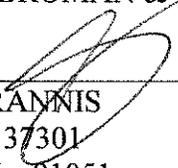
D. CONCLUSION

For the reasons set forth, Paulson requests that this Court reverse the conviction.

DATED this 24th day of September 2016

Respectfully Submitted,

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