

FILED

DEC 17 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28240-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ARTHUR JAMES BERGER JR.,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

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ASSIGNMENTS OF ERROR

1. The trial court should not have admitted Arthur James Berger Jr.'s refusal of a blood test.
2. Mr. Berger should not be subjected to an enhanced penalty under the implied consent law.
3. The evidence was insufficient to establish, beyond a reasonable doubt, each and every element of the offense of attempting to elude a pursuing police vehicle.
4. The trial court did not have the authority to impose sixty (60) months probation for Mr. Berger's conviction of driving while under the influence of intoxicating liquor (DUI).

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. In the absence of any evidence that a "qualified technician" was available to effect a blood draw on July 23, 2008, was Mr. Berger's refusal of that blood draw admissible in evidence?
2. Was evidence of the blood draw refusal improperly admitted since Mr. Berger requested an attorney prior to the refusal?
3. Is Mr. Berger subject to an enhanced penalty due to the blood draw refusal?

4. Did the State establish, beyond a reasonable doubt, each and every element of the offense of attempting eluding a pursuing police vehicle?

5. Did the trial court have authority to impose sixty (60) months probation on a gross misdemeanor conviction of DUI; and/or does imposition of sixty (60) months probation exceed the statutory maximum penalty for that conviction?

STATEMENT OF CASE

Mr. Berger was late - "late for a very important date." *See:* Alice in Wonderland. Speeding down I-82 near Granger he was rocking out to 94.5 FM. He had also been drinking earlier in the day while at a golf course in Yakima. (Trial RP 114, ll. 3-4; RP 117, ll. 4-7; RP 136, ll. 5-14; RP 509, ll. 21-22; RP 510, ll. 4-5; RP 514, ll. 2-3; RP 516, ll. 5-12)

Prior to taking the exit into Granger Mr. Berger was passing other vehicles; cutting them off; swerving across the eastbound lanes; and at times driving onto the gravel shoulder spraying following cars with gravel. (Trial RP 113, ll. 16-21; RP 114, ll. 10-16; RP 116, ll. 5-10; RP 136, ll. 17-20; RP 137, ll. 6-8; RP 138, ll. 20-25; RP 140, ll. 15-17; RP 141, ll. 14-18; RP 515, l. 22 to RP 516, l. 4)

Socorro Trujillo was also driving on I-82. She called 9-1-1 on her cell phone. She followed the car as it took the Granger exit and pulled into a Conoco station. (Trial RP 136, ll. 5-14; RP 141, ll. 4-11; RP 143, ll. 24-25; RP 144, ll. 3-5)

Ms. Trujillo saw a Granger police car parked at the Conoco station. She went inside the building and handed her cell phone to Officer Leary. She told him about the driving she had observed and that the car was parked at the pumps. (Trial RP 144, l. 24 to RP 145, l. 2; RP 145, ll. 19-23; RP 146, l. 20 to RP 147, l. 3)

Mr. Berger had also gone into the building to use the restroom. As he walked by Ms. Trujillo and the officer she told the officer that he was the driver of the car. (Trial RP 148, ll. 4-24; RP 217, ll. 2-5; RP 484, ll. 6-10)

Officer Leary followed Mr. Berger out of the Conoco building. He said "Sir, stop." Mr. Berger continued to his car, got inside, put on his seatbelt, started the car and punched it. (Trial RP 168, ll. 14-19; RP 208, l. 22; RP 218, ll. 3-9; RP 218, l. 21 to RP 219, l. 3; RP 219, ll. 8-14; l. 17; RP 48, ll. 3-7)

Neither Ms. Trujillo nor Officer Leary saw Mr. Berger stumble, stagger, or otherwise have difficulty walking from the Conoco building to his car. (Trial RP 174, ll. 9-25; RP 331, l. 19 to RP 332, l. 7)

As Officer Leary stood near the gas pumps he saw Mr. Berger make eye contact with him, smile and give him the finger as he accelerated away. Officer Leary ran to his patrol car and immediately activated the lights and siren. (Trial RP 149, ll. 18-22; RP 220, ll. 14-16; RP 224, ll. 19-25; RP 523, ll. 22-23)

As Mr. Berger accelerated down Bailey Avenue his speed increased. At a slight curve he was traveling approximately sixty-eight (68) miles per hour. The car slightly lost traction. He continued to accelerate to over one hundred (100) miles per hour. He hit a curb on Granger Avenue and demolished the fence and a light pole near the Granger School District Administration Building. (Trial RP 230, l. 23 to RP 231, l. 8; RP 234, ll. 13-23; RP 235, ll. 3-12; RP 248, ll. 20-25; RP 489, ll. 9-11; RP 490 ll. 23-24; RP 491, l. 22)

Officer Leary kept Mr. Berger's car in sight until it turned onto Granger. He estimated an approximate one-half (1/2) mile distance between his patrol car and Mr. Berger's car. Mr. Berger denied seeing Officer Leary's patrol car behind him. (Trial RP 330, ll. 4-20; RP 357, ll. 11-22; RP 363, ll. 3-19; RP 371, l. 24 to RP 372, l. 2; RP 493, ll. 1-2; RP 532, ll. 1-3; ll. 16-18)

By the time Officer Leary arrived at the accident scene Mr. Berger was trying to climb out the driver's side window. He was yelling profanities. He claimed his leg was broken. (Trial RP 264, l. 21 to RP 265, l. 13)

Both Officer Leary and Trooper Rutherford (who had then arrived on the scene) detected a strong odor of intoxicants. They saw that Mr. Berger's eyes were bloodshot and watery. He was belligerent and had an aggressive attitude. His face was flushed and the profanities continued. (Trial RP 266, ll. 14-20; RP 268, ll. 1-3; RP 376, ll. 16-17; RP 384, l. 25 to RP 385, l. 4)

An open can of beer was found inside the car. There was no evidence that Mr. Berger was using drugs. (Trial RP 269, l. 5; l. 22; RP 428, ll. 15-17)

Trooper Rutherford believed that Mr. Berger was under the influence of intoxicating liquor. He advised him of his *Miranda*¹ warnings. As the ambulance personnel worked on Mr. Berger in the back of the ambulance the trooper advised him of his implied consent warnings for blood. (Trial RP 395, ll. 3-4; RP 396, ll. 8-11; RP 402, l. 7; RP 403, ll. 21-22)

After hearing the implied consent warnings Mr. Berger stated “What the fuck are they going to do, suspend my already suspended license?” Mr. Berger’s driver’s license was suspended in the second degree. He was not eligible to reinstate it. (Trial RP 273, ll. 7-15; RP 408, ll. 16-18)

When Trooper Rutherford asked Mr. Berger if he would submit to a blood draw he stated: “I’m not doing anything and I want a lawyer.” (Trial RP 18, ll. 4-18; RP 408, ll. 19-22)

Trooper Rutherford checked the refusal box on the DUI interview form. (Trial RP 411, ll. 16-22)

An Information was filed charging Mr. Berger with attempting to elude a pursuing police vehicle and DUI. (CP 84)

¹ *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966)

Subsequent amended informations were filed on February 19, 2009 and February 20, 2009. The charge of driving while license suspended second degree (DWS 2°) was added to the original Information. (CP 75; CP 77)

Mr. Berger's pre-trial motion to exclude the blood draw refusal was denied. (Trial RP 67, ll. 3-23)

Defense counsel's motion to dismiss the charge of attempting to elude a pursuing police vehicle was denied. (Trial RP 551, ll. 14-21)

The jury found Mr. Berger guilty as charged. It answered the special verdict form (blood draw refusal) - "Yes." (CP 23; CP 24; CP 25; CP 26)

Judgment and Sentence was entered on June 15, 2009. The trial court sentenced Mr. Berger to eighteen (18) months on attempting to elude a pursuing police vehicle. The Court imposed a three hundred and sixty-five (365) day sentence, with three hundred and sixty-three days suspended, on the DUI to run consecutive to the felony conviction. Three hundred sixty-five (365) days, with no time suspended, was imposed on the DWS 2° to run concurrent with the felony sentence. Sixty (60) months of probation was also imposed on the DUI. (06/15/09 RP 1 *et seq.*; CP 13)

Ms. Berger filed his Notice of Appeal on June 18, 2009. (CP 3)

SUMMARY OF ARGUMENT

Absence of proof that a “qualified technician” was available to perform the blood draw, in combination with Mr. Berger’s request for an attorney, precludes use of the blood draw refusal as evidence in a trial.

The State failed to present sufficient evidence of each and every element of attempting to elude a pursuing police vehicle.

Mr. Berger’s sentence on DUI exceeds the statutory maximum punishment for a gross misdemeanor.

ARGUMENT

I. IMPLIED CONSENT

Former RCW 46.20.308(1) provides, in part:

Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration ... in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving ... a motor vehicle while under the influence of intoxicating liquor ... in violation of RCW 46.61.503.
...

RCW 46.61.506 is inapplicable to Mr. Berger's case insofar as any breath test is concerned. However, because Trooper Rutherford requested a blood draw, RCW 46.61.506(5) applies.

RCW 46.61.506(5) states, in part:

When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic ... content may be performed only by a physician, a registered nurse, a licensed practical nurse, a nursing assistant as defined in Chapter 18.88A RCW, a physician assistant as defined in Chapter 18.71A RCW, a first responder as defined in Chapter 18.73 RCW, an emergency medical technician as defined in Chapter 18.73 RCW, a healthcare assistant as defined in Chapter 18.135 RCW, or any technician trained in withdrawing blood.

Trooper Rutherford read the implied consent warnings to Mr. Berger. He read them in the back of the ambulance. The State failed to present any testimony concerning the qualifications of ambulance personnel to draw blood.

Furthermore, Mr. Berger stated he wanted an attorney.

An arrested driver subject to a breath test must be advised of the *Miranda* rights and right to access counsel under CrRLJ 3.1. *State v. Staeheli*, 102 Wn.2d 305, 309, 685 P.2d 591 (1984). **"If the defendant requests the assistance of counsel, access to counsel must be provided before administering the test."** *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824, 831, 675 P.2d 599 (1984).

State v. Kronich, 131 Wn. App. 537, 542-43, 128 P.3d 119 (2006). (Emphasis supplied.)

Mr. Berger made it abundantly clear that he wanted an attorney. Trooper Rutherford did not follow through on that request.

In addition, RCW 46.20.308(3) should be considered on this issue.

It states, in part:

Except as provided in this section, the test administered shall be of the breath only. ... [I]f an individual is under arrest for the crime of driving while under the influence of intoxicating liquor ... as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

Since no other person was injured in the accident, the concluding language of RCW 46.20.308(3) precludes a non-consensual blood draw.

Moreover, RCW 46.20.308(5) provides:

If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

RCW 46.20.308(4) is inapplicable to the facts and circumstances of Mr. Berger's case.

Properly interpreted RCW 46.20.308(2) establishes those instances in which a driver is given the choice between either (A) submitting to a test of his breath or blood (depending on the circumstances) or (b) losing his license. RCW 46.20.308(3) on the other hand outlines those circumstances in which a test of breath or blood may be administered without the driver's consent. ...

... **The language “[e]xcept as provided in this section” applies to ALL of RCW 46.20.308** and is not limited to those instances enumerated in subsection (3). To hold otherwise would contradict the rules of statutory construction

City of Kent v. Beigh, 145 Wn.2d 33, 42-43, 32 P.3d 258 (2001). (Emphasis supplied.)

RCW 46.20.308(2) allows a blood draw under certain specific conditions. It states, in part:

The test or tests ... shall be administered at the direction of a law enforcement officer [I]n those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a[n] ... ambulance, ... a blood test shall be administered by a qualified person as provided in RCW 46.61.506(5). ...

It is this combination of lack of proof of a “qualified technician” to effect a blood draw in the back of the ambulance, Mr. Berger’s request for an attorney, and the current state of the law that substantiates the inadmis-

sibility of the blood draw refusal. The trial court's ruling that it was admissible is in error.

Mr. Berger concedes that the trial court was never given the opportunity to determine if a "qualified technician" was present in the ambulance. The State's failure to offer such evidence should not preclude Mr. Berger from raising the issue at this time. *See: State v. Merritt*, 91 Wn. App. 969, 975-6, 961 P.2d 958 (1998).

Finally, Mr. Berger argues that since the Second Amended Information did not put him on notice that he would suffer an enhanced penalty for a blood draw refusal, then the presentation of that issue to the jury was error. The due process clauses of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3 require notice pleading.

Enhanced penalty provisions contained in various statutes, along with the caselaw interpreting those statutes, require notice pleading. *See: RCW 9.94A.533; RCW 9.94A.602; RCW 9.94A.605; State v. Tresenriter*, 101 Wn. App. 486, 4 P.3d 145, *opinion amended on reconsideration*, 14 P.3d 788, *review denied*, 143 Wn.2d 1010, 21 P.3d 292 (2000); *State v. Zamora*, 63 Wn. App. 220, 224, 817 P.2d 880 (1991).

In *State v. Pillatos*, 159 Wn.2d 459, 482-83, 150 P.3d 1130 (2007) the Court, in examining the essential elements rule, stated:

"When prosecutors seek *enhanced penalties*, notice of their intent must be set forth in the information." *State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980) (emphasis added). An allegation "is an element of the

offense where it aggravates the maximum sentence with which the court may sentence a defendant.” *Goodman*, [*State v. Goodman*, 150 Wn.2d 744, 83 P.3d 410 (2004)] at 785-86 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000)). So, if a statute permits “the infliction of a heavier sentence when it is shown that the accused committed the crime in question under circumstances showing aggravation ..., it is necessary that the matter of aggravation relied upon as calling for such sentence be charged in the indictment or complaint.” *State v. frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972) (quoting 4 RONALD A. ANDERSON, WHARTON’S CRIMINAL LAW AND PROCEDURE § 1788, at 610 (1957)).

II. SUFFICIENCY OF THE EVIDENCE

Mr. Berger challenges the sufficiency of the evidence to convict him of attempting to elude a pursuing police vehicle.

“... [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.”

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), *quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).

Even viewing the evidence in a light most favorable to the prosecution, it is apparent that the State failed to carry its burden of proof.

RCW 46.61.024(1) defines the crime of attempting to elude a pursuing police vehicle. It states:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop **and** who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform **and** the vehicle shall be equipped with lights and sirens.

(Emphasis supplied.)

The statutory language is in the conjunctive. The statute is complex. Certain portions of the statute were established by the State. However, deficiencies exist.

Mr. Berger concedes the following:

1. Officer Leary was in uniform;
2. Officer Leary's patrol car was equipped with lights and a siren;
3. Mr. Berger drove his car in a reckless manner; and
4. Officer Leary said: "Sir, stop."

What the State did not establish is the following:

1. That Mr. Berger was driving his car when the signal to stop was given;
2. That Mr. Berger had an opportunity to stop immediately after Officer Leary activated the lights and siren on his patrol car; and
3. That Mr. Berger knew Officer Leary was in pursuit.

As the COMMENT to WPIC 94.02 states:

The crime of attempting to elude is best analyzed by examining its elements in the chronological order in which they must appear. *State v. Tandecki*, 153 Wn.2d 842, 109 P.3d 395 (2005); *State v. Treat*, 109 Wn. App. 419, 35 P.3d 1192 (2001); *State v. Stayton*, 39 Wn. App. 46, 691 P.2d 596 (1984). **First, a uniformed officer in a vehicle equipped with lights and sirens gives a signal to stop.** *Second, the driver fails to stop immediately.* Third, the driver drives in a reckless manner. **All three elements must occur in sequence** before the crime has been committed. See *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982); *State v. Stayton*, 39 Wn. App. At 49.

(Emphasis supplied.)

Mr. Berger asserts that the signal to stop was not given while Officer Leary was in his patrol car. He also contends that the accident occurred within such a short period of time (seconds) that the State could not establish that he did not immediately stop. (Trial RP 362, ll. 13-15)

Mr. Berger denied seeing Officer Leary's patrol car in pursuit. Officer Leary said he had line of sight for a limited period of time. Line of sight was through a chain link fence. (Trial RP 357, l. 23 to RP 358, l. 7; RP 360, ll. 1-7)

The State is required to prove that Mr. Berger had knowledge that Officer Leary was pursuing him in the patrol car. "... [W]illful failure ... implies knowledge that a signal has been given." *State v. Stayton*, 39 Wn.

App. 46, 49, 691 P.2d 596 (1984); *State v. Trowbridge*, 49 Wn. App. 360, 363, 742 P.2d 1254 (1987).

When all aspects of the case are given due consideration the deficiencies in the evidence preclude a determination of guilt beyond a reasonable doubt.

III. SENTENCING

Mr. Berger maintains that the trial court's sentence exceeds its statutory authority. "... [A] court may not impose a sentence in which the total time of confinement and supervision served exceeds the statutory maximum." *State v. Linerud*, 147 Wn. App. 944, 947 (2008).

The Court sentenced Mr. Berger to three hundred and sixty-five (365) days in jail with three hundred and sixty-three (363) days suspended on the DUI. It then imposed sixty (60) months probation on that offense.

Mr. Berger concedes that a DUI conviction is not covered by the SRA. Nevertheless, the Court is constrained by existing caselaw insofar as imposing a gross misdemeanor sentence and subsequent probation.

... [W]hether probation is ordered as a condition of a deferred sentence, a suspended sentence, or a combination of both, the total amount of probation time which may be imposed is limited to the maximum term for the underlying offense.

State v. Parsley, 73 Wn. App. 666, 669, 870 P.2d 1030 (1994).

"The maximum penalty for a gross misdemeanor is one (1) year in the county jail" RCW 9A.20.020(2).

RCW 46.61.502(5) declares that a DUI is a gross misdemeanor.

RCW 46.61.5055(10)(a) grants authority to a Court to impose conditions of probation "... whenever the court imposes less than one year in jail"

The trial court imposed three hundred and sixty-five (365) days in jail. Three hundred and sixty-five (365) days equals one (1) year. Thus, the sentence is not less than one (1) year.

Furthermore, Mr. Berger submits that the case of *Avlonitis v. Seattle District Court*, 97 Wn.2d 131, 641 P.2d 169, 646 P.2d 128 (1982), (relying upon *State v. Monday*, 85 Wn.2d 906, 540 P.2d 416 (1975) and *State v. Mortrud*, 89 Wn.2d 720, 575 P.2d 227 (1978)), applies to sentencing in his case.

The *Avlonitis* Court ruled at 134-35:

The italicized portion of RCW 9.95.210 [the general statute governing courts of record and probationary authority] has been interpreted by this court as permitting the suspension of a sentence only for the term of the sentence *actually imposed* rather than for the maximum term for which it could have been imposed. *State v. Monday*, 85 Wn.2d 906, 540 P.2d 416 (1975). Although *Monday* involved a felony conviction in superior court, its holding was made applicable to gross misdemeanor convictions by *State v. Mortrud*, 89 Wn.2d 720, 575 P.2d 227 (1978).

We have been given no logical or compelling reason why the justice court, which has concurrent jurisdiction, should be excluded from the rules of *Monday* and *Mor-*

trud. Consequently, we hold that the rules of *Monday* and *Mortrud* apply equally to the justice court. The justice court could have imposed a sentence of 1 year in the county jail and suspended all or any part of it, thus retaining jurisdiction to revoke the suspension during the entire period. Having sentenced petitioner to only 30 days, however, the justice court retained jurisdiction only for the term of the sentence actually imposed, *i.e.*, 30 days, rather than for the 1-year maximum imposable term.

CONCLUSION

The blood draw refusal evidence should not have been submitted to the jury.

The absence of proof that a “qualified technician” was present in the ambulance negates Mr. Berger’s refusal.

The failure to comply with Mr. Berger’s request for an attorney further compounds this evidentiary error.

We do not understand *Apprendi* [*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000)] and *Blakely* [*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004)] to apply only to punishment in the form of prison sentences; both cases refer to punishment and neither limits its analysis to imprisonment.

State v. Kinneman, 155 Wn.2d 272, 278, 119 P.3d 350 (2005).

The enhancement for a blood draw refusal fits within the punishment provisions of *Apprendi* and *Blakely*.

The special verdict must be reversed and vacated with a direction to the trial court to so notify the Department of Licensing.

Mr. Berger's conviction for attempting to elude a pursuing police vehicle should be reversed and dismissed.

The most recent interpretation of a Court's authority to impose a sentence that may exceed the maximum sentence is *Personal Restraint of Brooks*, 166 Wn.2d 664 (2009). The Court held at 675:

... [W]hen a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.

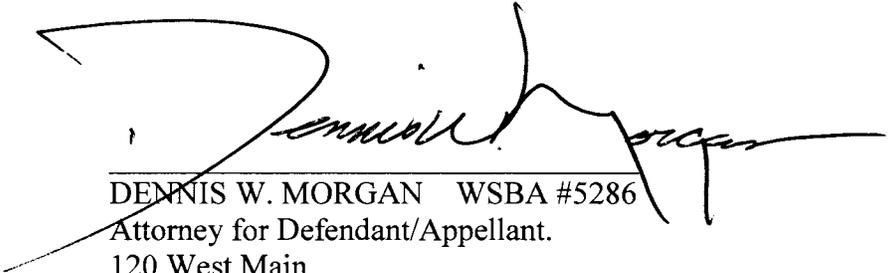
The statutory maximum punishment for DUI is three hundred and sixty-five (365) days. Community custody is the equivalent of probation.

Caselaw is clear that when a suspended sentence is imposed a court loses jurisdiction at the end of the period for which maximum punishment is provided.

Mr. Berger should be resentenced on the DUI conviction.

DATED this 16TH day of December, 2009.

Respectfully submitted,



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