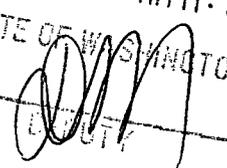


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DIVISION II
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STATE OF WASHINGTON
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No. 47559-6-II

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

State of Washington,

Respondent,

vs.

Kenneth Sean McMillian,

Appellant.

APPELLANT'S REPLY BRIEF ON APPEAL

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TABLE OF CONTENTS

A. REPLY TO STATE'S STATEMENT OF
FACTS.....1

B. ARGUMENT IN REPLY.....3

 1. Improper Continuance.....3

 2. Misrepresentation of the Evidence.....6

 3. Disclosure or Nondisclosure of Witness.....9

 4. Hearsay/Absence of Public Record.....10

 5. Improper Use of Theft Convictions.....12

 6. Missing Witness Instruction.....14

 7. Prosecutorial Misconduct.....14

 8. Sufficiency of the Evidence.....15

C. CONCLUSION.....19

TABLE OF AUTHORITIES

United States Supreme Court cases:

Miller v. Pate, 386 U.S. 1, 6-7, 87 S. Ct. 785, 17 L. Ed. 2d 690
(1967).....15

Other federal cases:

United State v. Neff, 615 F.2d 1235, 1242 (1980).....11
United States v. Rich, 580 F.2d 929 (1978).....11
United States v. Robinson, 544 F.2d 110, 114 (1976).....10

Washington state cases:

State v. Babich, 68 Wn. App. 438, 443-44, 842 P.2d 1053 (1993).....15
State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983).....16, 17, 18
State v. Hardy, 133 Wn.2d 701, 708, 946 P.2d 1175 (1997).....13
State v. Hudlow, 182 Wn.App. 266, 278, 331 P.3d 90 (2014).....12
State v. Kassahun, 78 Wn. App. 938, 952, 900 P.2d 1109 (1995).....6
State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1980).....15
State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2002).....12
State v. Rose, 62 Wn.2d 309, 313, 382 P.2d 513 (1963).....7
State v. Teal, 117 Wn. App. 831, 844, 73 P.3d 402 (2003).....13

Washington court rules:

ER 802.....12
ER 803(1)(10).....10

A. REPLY TO STATE'S STATEMENT OF FACTS

In its Statement of Fact, the State makes several erroneous or incomplete claims. First, the State claims that none of the State's witnesses saw anything to indicate that the Durango had been stolen or that anyone had forced entry into it. (Brief of Respondent, p. 4). But, that is misleading. Cpl. Reed testified that from the outside of the car, he did not see evidence that a door lock had been punched or that the doors had been forced open. But he candidly admitted that he did not look for any such evidence, either inside or outside. (RP 129-130).

The State says that there was no testimony about when Mr. McMillian's auto ignition was tampered with, and implied throughout the trial and on appeal that the tampering claim was a fabrication by Mr. McMillian. But, even Cpl. Reed testified that the housing over the steering column was missing as if it had either been tampered with or had fallen off. (RP 153-54). He also testified that he is not an expert in the techniques of car theft. (RP 154-55). Plus, Andre McMillian, the father of Kenny McMillian, testified that he helped his son work on the Durango at Andre's house in September, a month before Kenny picked up the car from the sheriff's impound, and the steering column shroud was in place at that time. (RP 318). Thus, the tampering must have occurred during

that same time frame. Amber Miller testified that the steering column cover was always in place up to the point that she last saw the car, which was in October, a few days after Kenny left their shared home, about a week before he reported the car missing. (RP 342). The State is incorrect that there is no evidence of when the tampering occurred.

The State is also incorrect in claiming that Miguel Silva was bribed by Mr. McMillian and then reported that to the police. Mr. Silva did not report it for a long, long time. He said he was working for someone else near his house, heard a loud noise around noon coming from his house, so took a lunch break to go see what was happening. He saw the police had a Durango loaded up and were taking it away. He did not try to talk to the police on that day or any other day. He did not call the sheriff's office to ask what the police were doing at his house, either. (RP 212).

Further, Mr. Silva knew that the police went to his house looking for him two or three times, but still he did not talk to them. He did not talk to the police at all until the following April, when he was served with a subpoena to come to court. (RP 213). Even though Cpl. Reed testified that he heard a noise from inside Mr. Silva's house when he knocked on the door, Mr. Silva testified that no one was in his house when he got home for lunch and saw the police leaving with the Durango in tow. (RP 216).

B. ARGUMENT IN REPLY

1. Improper Continuance

The State claims that the trial court did not grant the State a continuance in order for the State to investigate an alleged alibi witness, Frankie Marino. However, that is exactly what the court did, twice, and that is precisely the request made by the State.

Right after the State's request to re-call Mr. McMillian, the defendant himself, to the witness stand was denied by the court, the prosecutor told the court the following: "We have a serious issue here. This has become a trial by ambush. We have an alibi witness that has not been disclosed." The prosecutor went on to say that "I've been ambushed, and I'm asking for a remedy. And that remedy would be **another recess** to give the State an opportunity to follow up to make sure this person actually exists, to make sure that the person actually has a warrant or not." Finally, the State asked the trial court to inquire of the defense who is this person, what is their name, what is their phone number, and to require the defense to turn that information over to the State. (RP 387, emphasis added). Trial began on Tuesday, December 9th. The court recessed in the early afternoon until the following day, December 10th. (RP 19, 25). On

that day, the defense learned for the first time that the State intended to impeach the defendant with a theft 3 conviction that had not been disclosed to the defense prior to trial. (38). The State disclosed that it would be calling Miguel Silva, who the defense had not been able to interview. The defense had requested the State's assistance; the State lost track of the witness; the defense requested notification once he turned up, but received none. (RP 40). Also, the State never supplied the defense with a witness list prior to trial; during trial it emailed defense counsel copies of subpoenas, including a subpoena from the State for Amber Miller. (RP 43, 44, 45). The defense did not claim "ambush" for any of these, or even all of them. Frankly, the only point in mentioning these is to demonstrate the State's unclean hands for all of its "ambush" arguments.

Trial continued until the State complained "ambush" and obtained a short recess on December 16th at 3:34 pm, to 10:46 a.m. on December 17th. At the time it granted the State a recess, the court appeared to believe that the remedy would be a missing witness instruction for Frankie Marino's absence, because Amber Miller was not an alibi witness. (RP 390-91). At page 391, the prosecutor states, consist with the defense's recitation of what happened, that the trial court had given the State a recess to give the State time to investigate and rebut the defendant's own

testimony. (RP 391-93). The defense had submitted a motion to dismiss per CrR 8.3(b), but without knowing whether the State had obtained any rebuttal evidence during its recess for that purpose, could not point to any specific prejudice. (RP 393). But the prejudice became clear later when the State had Cpl. Reed testify that he could find no evidence that there was a warrant for Frankie Marino – testimony that was allowed in by the trial court despite being clearly hearsay for which no exception was even alleged, much less established.

The defense repeatedly stated that the prosecutor had been informed that Amber Miller would testify, (RP 389), which the prosecutor claimed not to remember but could not deny. (RP 395). In fact she was on the State's list of subpoenaed witness as well. (RP 260). Yet the State never interviewed her or made any attempt to do so until the middle of trial when it suddenly claimed ambush by the defense. The deputy prosecutor in question displayed an unfortunate proclivity to claim surprise and ambush and delay. For example, the DPA started the trial by claiming that the defense had waived its motion to suppress involving the police impound of the defendant's car, and characterized the defense argument as ludicrous. (RP 3, 12). However, the defense was clearly making a good faith argument to change existing law. But, the DPA had already made and lost his waiver argument before the commissioner. He

cannot simply come back and try again before a different judge of the same court. The further argument was judge shopping. The DPA also argued that the defense motion to suppress evidence on a charge of unlawful recording was waived because it was not filed by omnibus hearing. (RP 26). But he did not inform the court that he had not even filed the unlawful recording charge until almost three months after the final omnibus hearing. (RP 29).

2. Misrepresentation of the Evidence

It is misconduct for a prosecutor to misrepresent the evidence, as briefed in Mr. McMillian's opening brief. It is also misconduct where a prosecutor implies that evidence either exists or does not exist when he knows otherwise. *State v. Kassahun*, 78 Wn. App. 938, 952, 900 P.2d 1109 (1995).

In *Kassahun*, the court presented the issue and ruled as follows:

Having prevailed by motion in limine in its effort to preclude Kassahun from discovering objective evidence of Walker's gang membership and gang activities and that of some of the witnesses who were in the parking lot at the time of the shooting, it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer objective evidence to support his belief that his business was being overrun by gangs. The trial court erred in overruling Kassahun's objection to this argument. Because we are reversing on other grounds, we need not analyze whether this misconduct and trial court error prejudiced Kassahun's right to a fair trial. We simply direct that the misconduct not be repeated at the new trial.

Reversed and remanded for a new trial.

Kassahun, at 952.

In *State v. Rose*, the prosecutor argued that the evidence showed the defendant was drunk. But, the evidence actually showed that while the defendant had been drinking, he was not intoxicated. Our Supreme Court held that this was prejudicial error and misconduct by the prosecutor. 62 Wn.2d 309, 313, 382 P.2d 513 (1963), as follows: “On the subject of intoxication, not only was the distinction drawn between merely drinking and being drunk, but the unmistakable inference from the state's own witnesses was that the appellant was not drunk. Thus, the deputy prosecutor's remark to the jury was not a reasonable deduction, it was not supported by the evidence, and it was clearly prejudicial.” *Id.*, at 313.

In plain language, it boggles the mind that any prosecutor would knowingly mislead a jury; yet that is exactly what happened in the present case when the prosecutor argued that Mr. McMillian's reported theft of his car was false because it took Mr. McMillian some time to pick up his impounded car from the sheriff. (RP 509). The prosecutor knew full well that Mr. McMillian called the sheriff's office soon after discovering the alleged theft and that the sheriff required Mr. McMillian, and anyone else who wants to pick up property from the sheriff, to make an appointment with the evidence officer. Specifically, Mr. McMillian called to report the

car theft on October 8th, (RP 133) and he left a phone number where he could be reached. (RP 134). The phone number Mr. McMillian left was his father's number, so the police would have to call Mr. McMillian, senior, who would then have to locate his son. (RP 136). Then, after McMillian senior got hold of McMillian junior, McMillian junior had to call the sheriff's evidence officer, Officer Melissa Wood, to schedule an appointment to retrieve the vehicle.

Officer Wood then sets the appointment based on her own reasons including her availability and schedule. (RP 352). She set the appointment for October 21st. (RP 135). Officer Wood supported Mr. McMillian's testimony. She confirmed that after Mr. McMillian arrived to pick up his car, she made him set a separate appointment at a later date to pick up his phone. (RP 165).

This matter was discussed thoroughly with the court outside the presence of the jury, and the prosecutor was on clear notice that he was making an invalid argument, yet he chose to do so anyway. (RP 133-136).

The State's brief also mischaracterizes the continuance that took place. While it is true that the final continuance essentially an early recess for the day and an overnight break from Tuesday to Wednesday, the court had already given the State from Friday to Tuesday as a continuance for the same purpose: the State's false claim of ambush and argument that the

defendant had to disclose all information within the defendant's own knowledge regarding where he was during the time of the burglary. The law does not support the State's argument or the court's ruling or grant of a continuance.

3. Disclosure or Nondisclosure of Witness

The State argued that Frankie Marino was an alibi witness who was required to be disclosed. But, the defendant was the only witness who knew that information. Amber Miller only knew him as "Frankie". In fact, the prosecutor says this in black and white: "I did have a chance to interview Amber Miller late on Friday. She disclosed that she thought the defendant was with someone named Frankie. She didn't give me a last name. Obviously, that's information that's only within the knowledge of the defendant. It has been disclosed toward the middle – at the end of trial. . . . I've been ambushed and I'm asking for a remedy. And that remedy should be *another recess* to give the State an opportunity to follow up" (RP 387)(emphasis added). The trial court ruled that the information regarding Frankie Marino needed to be disclosed by the court rules. (RP 388-89). DPA Sigmar goes on to argue that case law, which he did not disclose, requires the defendant to disclose this information even if it is solely in the knowledge of the defendant. (RP 389, 397). The trial court ruled that there was no error in granting the State's continuance,

likening it to a situation where a defendant would testify that he was in the hospital in Spokane during a robbery in Olympia. The trial court believed that the defendant had to disclose that prior to trial. (RP 406). But, the trial court was wrong. There is no such authority. The defense must disclose the nature of the defense, which it did, and any alibi witnesses the defense intended to call. Here, McMillian never intended to call Marino, because Marino told him he had a warrant for his arrest. Thus, Marino was not required to be disclosed in advance of McMillian's testimony, or any other time, and the State was not entitled to a continuance to investigate the defendant's testimony. CrR 4.7.

4. Hearsay/Absence of Public Records

Next, the State argues that it was proper for the State to introduce Cpl. Reed's testimony that he could not locate a warrant for Frankie Marino under ER 803(1)(10), absence of public records. But, that exception was not proffered by the State. In fact, the State did not claim any particular rule at all, nor did the court. Moreover, for ER 803(a)(10) to be used, there must be testimony from someone in charge of the records that the records are regularly made and preserved and a diligent search was made. *United States v. Robinson*, 544 F.2d 110, 114 (1976). There was no such testimony here. Cpl. Reed testified that he did not even know what a DOC Secretary's Warrant was, did not know how to check for that,

and knew virtually nothing about the databases that he did check. That is insufficient to show that the testimony is reliable per *Robinson*. The question of trustworthiness is crucial and must be resolved first by the trial court before going to the jury as weight. *Id.*, at 115. If such evidence is allowed it must be shown to be reliable. *United State v. Neff*, 615 F.2d 1235, 1242 (1980). Finally, in *United States v. Rich*, a 9th Circuit case, the court said that while the absence of public records could be admitted under the rule, it would not be conclusive on the issue and must be supported by a sufficient foundation for trustworthiness. The exceptions to the hearsay rules are grounded on a high probability of the accuracy of such records. Thus, the foundation must include evidence that such records are maintained regularly and systematically by persons having a duty to make accurate records and are relied upon in the course of daily operations. 580 F.2d 929 (1978). The problem in *Rich* was that the defense attorney did not object to the lack of foundation. Here, however, the defense attorney objected on exactly that basis, plus lack of personal knowledge and hearsay. (RP 421).

Here, there was no evidence of accuracy and trustworthiness. Cpl. Reed described how he accesses the databases he used, what kind of information they might provide, and such minor things as this. But he did not and could not testify that the records were maintained regularly and

systematically by persons having a duty to make accurate records because he did not know any of that information. (RP 421-24). That evidence was also obtained via a continuance, albeit brief, to allow the State to investigate and rebut the defendant's own testimony, on the State's and judge's belief that the defendant had an obligation to disclose his testimony prior to trial.

Admission of the evidence of the lack of a warrant prejudiced Mr. McMillian. No person in this country can be convicted with inadmissible evidence. "Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. The use of hearsay impinges upon a defendant's constitutional right to confront and cross-examine witnesses. *State v. Hudlow*, 182 Wn.App. 266, 278, 331 P.3d 90 (2014), citing *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2002) (trial court abuses its discretion by admitting hearsay evidence contrary to law; trial court erred in admitting a certificate of an expert).

The convictions should be reversed.

5. Improper Use of Theft Convictions

The State concedes that its trial deputy should not have argued to the jury that both Mr. McMillian and Amber Miller, his fiancée, were convicted thieves. (State's brief, p. 13). This concession appears to be well taken, as the use of a crime of dishonesty is limited to the fact of

conviction. The rule allows evidence of conviction of a crime of dishonesty for impeachment only. But here, the State's use of the phrases in argument, "He's a convicted thief", and "She's a convicted thief" fully invite the juror to convict because these people are thieves. That is an inadmissible use of the evidence.

Simply because a witness has committed a crime in the past does not mean he or she will lie on the witness stand. *State v. Hardy*, 133 Wn.2d 701, 708, 946 P.2d 1175 (1997). When the jury learns that the defendant has previously been convicted, the probability of conviction increases dramatically, and places the defendant in a catch-22 – either forego testifying or testify and be branded a criminal. *Id.*, at 711. Further, the potential for prejudice is undoubtedly greater where the prior conviction is similar to the current offense. *State v. Teal*, 117 Wn. App. 831, 844, 73 P.3d 402 (2003).

Thus, were misdemeanor theft not characterized as a crime of dishonesty, Mr. McMillian's and Ms. Miller's convictions for theft 3 would not have been admissible due to the great probable prejudice. The defendant contends that in the circumstances of this case, where the court also allowed the missing witness instruction, the chance of his receiving a fair trial was next to zero, due to the combined prejudice. Add to that

prejudice the prosecutor's improper use of the conviction and reversal is the only fair result.

The State points out that the defendant did not object during its close to either the "he (and she) is a convicted thief", but the defendant did move to exclude the prior thefts prior to their use at trial ; when that was denied he moved to limit it; the court denied that as well. (RP 321-324). Thus, there was no waiver.

6. Missing Witness Instruction

The State argues that the warrant for Frankie Marino's arrest was an insufficient reason not to give the missing witness instruction. This was thoroughly argued in the defendant's opening brief and at trial so will not be repeated here, except to note that a trial court must be wary of the defendant's constitutional rights in a criminal trial, which include unfair prejudice, and that a warrant does satisfactorily explain Mr. Marino's absence. If Mr. Marino would not appear because he had a warrant out for his arrest, and there is no reason or authority that would require Mr. McMillian to disregard his word on that, he certainly would not appear because of a material witness warrant.

7. Prosecutorial Misconduct

The State then argues the various incidents where the prosecutor misrepresented the evidence in addition to the one cited at the outset of

this brief. (State's brief p. 16). The State claims the prosecutor "misspoke" when he misrepresented Cpl. Reed's testimony about the size of McMillian's shoes. (State's Brief, p. 16). But that only supports the defendant's contention that the court should have fixed the error when it had a chance to do so. The court did not do so, despite repeated misrepresentations by the State. It is not sufficient for the State to argue that jurors are presumed to follow the instructions. It is misconduct for a prosecutor to misrepresent the evidence. *Miller v. Pate*, 386 U.S. 1, 6-7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967).

The State also concedes that it is bad practice for a prosecutor to risk implying that he has personal knowledge of the answer when cross-examining a defense witness. (State's Brief p. 20). Yet, the prosecutor here did exactly that, and the trial court allowed it repeatedly over proper defense objection. Use of such tainted evidence violates the defendant's right to confront the witnesses against him. *State v. Babich*, 68 Wn. App. 438, 443-44, 842 P.2d 1053 (1993).

8. Sufficiency of the Evidence

Finally, the State argues that the evidence was sufficient for the burglary and possession of stolen property charges. If possession of stolen property by itself is not sufficient to prove burglary, *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1980), then the lack of proof of possession

certainly cannot prove either burglary or possession of stolen property. The problem with the evidence here is that the defendant, Kenny McMillian, was never seen at or near either the burglary scene or the location where the Durango was found loaded with stolen property. There is not a shred of proof that he was ever in possession of the stolen property, either. All that exists is a series of speculation but no proof.

The State claims the nexus between the defendant and the stolen property is proved by the fact that the stolen property was in the defendant's car. But, no case law supports that, and it presumes or speculates that no car owner would ever loan his car to someone else and that his car could not have been used by anyone else, even if it was stolen. Even if the jury did not believe the car was stolen, there is no evidence that Mr. McMillian drove it at any time near the date of the burglary or the possession charges. Neither actual possession nor constructive possession was proved.

A similar case was *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983). There, as in the present case, the only connection of the defendant to the theft was that his vehicle was seen at or near the scene of the crime.

In *Baeza*, a witness was driving down a highway in rural eastern Washington around 9 p.m. when he saw some cattle outside their pasture, standing near the road. The witness saw a tan Chevrolet pickup truck and

a green and white Dodge pickup truck pull off the road and park near the cattle. The witness thought a cattle theft was occurring, and he turned around and followed the trucks, reaching high speeds. He lost the trucks, but saw the Dodge backed into the shop of a nearby farmstead. He also got the license number of the tan Chevrolet. The witness and the cattle owner and the sheriff went to the farmstead, and found the tan Chevrolet parked near the shop with the keys in the ignition. There was a freshly butchered calf hanging in the shop. About five minutes later, the Dodge truck drove by and accelerated as it passed near the patrol car. The defendant was the registered owner of the Dodge. The Chevrolet was a ranch vehicle assigned to the defendant's father, who had been out of the area at the time of the theft. *Id.*, at 489-90.

The Court ruled that sufficiency of the evidence is of constitutional magnitude in a criminal case. "At best, the State's evidence placed petitioner in the general vicinity of the crime. No witness, however, identified him until he drove by the shop building at least an hour after Apraks observed the cattle and two pickups on Dodson Road. Petitioner's alleged connection with the crime rests solely on an identification of his green and white Dodge pickup.

"The fact that he may have owned the green and white Dodge pickup does not establish guilt beyond a reasonable doubt. No one

identified petitioner as having been on Dodson Road when the theft apparently occurred, at the shop building when the calf was delivered, or later, when the calf was discovered. Further, the State offered no proof that petitioner had masterminded or even aided the theft in some way.

“No rational trier of fact could have found the State proved beyond a reasonable doubt that petitioner acted with an intent to deprive or defraud the owner of the slaughtered animal or that he willfully took or slaughtered or appropriated the animal to his own use. Consequently, there is no proof petitioner committed the crime charged. We therefore reverse the conviction and dismiss the case.” *Id.*, at 490-91.

Here, no witness identified Ken McMillian at *any* time anywhere near either the burglary or the Durango with the stolen goods inside, or even in the entirety of Mason County on that date or any date near to it. McMillian’s alleged connection with the burglary and possession of stolen property rests solely on an identification of the Dodge Durango as being registered to him. The fact that he may have owned the Durango does not establish guilt beyond a reasonable doubt. No one identified McMillian as having been at the burglary scene, as leaving the Durango across the street from the burglary scene or even that the abandoned Durango was McMillian’s Durango, at Mr. Silva’s where the Durango was located, or anywhere else connected with either crime. The State offered no proof

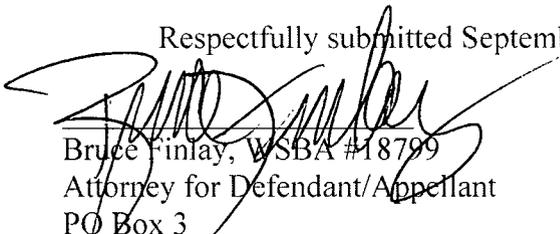
that McMillian had masterminded or even aided those crimes in some way.

No rational trier of fact could have found the State proved beyond a reasonable doubt that McMillian entered Mr. Peterson's shed, took items from it, placed them in the Durango, and drove it to Mr. Silva's house. Consequently, there is no proof that McMillian committed those crimes, and the convictions should be reversed and the case dismissed.

III CONCLUSION

For the foregoing reasons, this Court should reverse the convictions and dismiss the case.

Respectfully submitted September 28, 2016.



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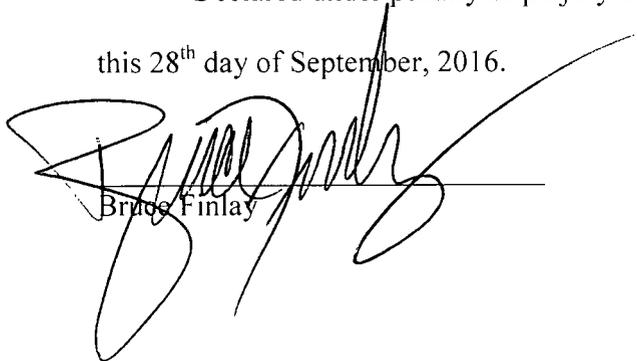
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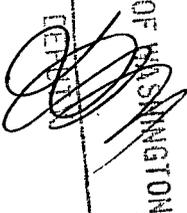
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Declared under penalty of perjury under the laws of the State of Washington
this 28th day of September, 2016.


Bruce Finlay

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