STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2014AP1566 & 2014AP1567

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROYCE L. HAWTHORNE,

Defendant-Appellant.

APPEAL FROM A DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts; accordingly, the State requests neither oral argument nor publication.

STATEMENT OF THE ISSUE

To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was both deficient and prejudicial. Here, Royce L. Hawthorne has neither shown deficiency nor prejudice. Has Hawthorne shown counsel was ineffective?

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

Defendant-Appellant Royce L. Hawthorne's statement of the case is sufficient to frame the issues for review. As Respondent, the State exercises its option not to present a full statement of the case, but will supplement facts as needed in its argument. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

Hawthorne's ineffective assistance of counsel claims are without merit.

Hawthorne argues his postconviction counsel was ineffective for failing to challenge trial counsel's: (1) opening and closing statements; (2) failure to object to the applicability of the forfeiture by wrongdoing exception on Confrontation Clause grounds; (3) failure to adequately cross-examine a witness; (4) failure to object to the reasonable doubt jury instruction; (5) failure to object to the amended information; (6) failure to object to joinder; (7) failure to object to the State's selective prosecution; and (8) failure to object to the State's opening and closing statements.

Hawthorne also argues that postconviction counsel should have argued that the evidence against him was insufficient, the court improperly ordered the jail recordings redacted, the State failed to properly authenticate the recordings, and the State failed to show Hawthorne caused the witnesses' unavailability.

As a preliminary matter, the State notes that Hawthorne's arguments described in the preceding paragraph actually concern appellate counsel, not postconviction counsel. As such, those arguments should have been raised in a *Knight*[1] petition, not the *Rothering*[2] petition that Hawthorne filed in the circuit court, which is now on review here. *See State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶¶1, 8, 9, 314 Wis. 2d 112, 758 N.W.2d 806. Despite this, the State shall address the claims as if Hawthorne had followed the proper procedural rules.

A. Standard of review.

"Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law." *State v. Champlain*, 2008 WI App 5, ¶19, 307 Wis. 2d 232, 744 N.W.2d 889. A trial court's findings of fact are reviewed for clear error, but whether counsel's performance is constitutionally infirm is a question of law, reviewed de novo. *Id.*

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[1] *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

[2] *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).

B. Relevant law.

"Wisconsin applies the two-part test described in *Strickland* [*v. Washington*][3] for evaluating claims of ineffective assistance of counsel." *State v. Roberson*, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111 (footnote added). A defendant claiming ineffective assistance of counsel must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In arguing that postconviction counsel was ineffective for failing to adequately challenge the ineffectiveness of trial counsel, a defendant must establish that trial counsel's performance was deficient and that he was prejudiced by that deficiency. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

With respect to the "performance" prong of the test, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Reviewing courts are strongly cautioned to avoid gratuitous second-guessing after a defense ultimately proves to be unsuccessful: "Judicial scrutiny of counsel's performance must be highly deferential. . . . [T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689 (citation omitted). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690.

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

With respect to the "prejudice" component of the test, the defendant must affirmatively prove that the alleged defects in counsel's performance "actually had an adverse effect on the defense." *Id.* at 693. The defendant cannot meet his burden by merely showing that the errors had "some conceivable effect on the outcome"; rather, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693-94. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is the defendant's burden to show harm. *See State v. Anderson*, 2006 WI 77, ¶48, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126.

A defendant's claim of ineffective assistance of counsel fails when he has not satisfied either prong of the two-part test. *See Strickland*, 466 U.S. at 697.

C. Hawthorne has not shown deficient performance or prejudice from any of his postconviction counsel's alleged errors.

Because Hawthorne must demonstrate trial counsel was ineffective in order to succeed on his claim that postconviction counsel was ineffective, the State sets forth its arguments on how Hawthorne has failed to demonstrate trial counsel's ineffectiveness. *See Ziebart*, 268 Wis. 2d 468, ¶15.

1. Trial counsel's opening and closing statements.

Hawthorne complains that his trial counsel erred in his remarks to the jury in his opening statement and during closing argument.[4] Hawthorne has shown no deficient performance or prejudice from trial counsel's performance in this regard.

Hawthorne complains that his trial counsel, Douglas Bihler, told the jury during his opening statement, "I can tell you that this trial is going to be mostly about the first degree recklessly endangering safety charge" and "[w]hat they're going to show or try to show is that based on some statements of others and based on some jail recordings, jail phone call recordings, that Mr. Hawthorne is guilty of first degree recklessly endangering safety"[5] (38:19).[6] Hawthorne argues that through these two statements Bihler somehow conveyed to the jury that he conceded that Hawthorne was guilty on the two witness tampering charges.[7] Further, Hawthorne argues that Bihler's closing argument, which pointed the

[4] Hawthorne's Br. at 8-10.

[5] Hawthorne's Br. at 9.

[6] All of the record cites are to the record in Case No. 2014AP1566 unless otherwise noted.

[7] Hawthorne's Br. at 9.

jury to a photograph in support of Hawthorne's claim that he accidently shot the gun, operated as a "direct verdict" (40:31).[8] The State disagrees.

Bihler made his openings statements to the jury to set the case in context. It is not plausible to suggest that by simply informing the jury of what the State's case would show, Bihler conceded Hawthorne's guilt on any of the charges. And the State fails to understand Hawthorne's complaint regarding Bihler's closing argument. How could directing the jury to a photograph in support of Hawthorne's claim have been deficient performance or prejudicial?

Hawthorne has shown no prejudice from Bihler's statements. The evidence against him was overwhelming.

Milwaukee Police Detective Joseph McLin testified that he was dispatched to the hospital in April 2011, to meet Corneil Hawthorne, who had been shot in the leg (38:23-24). McLin testified that Corneil admitted that Hawthorne had shot him (38:37). McLin testified that he then met with Grace Hawthorne, Hawthorne and Corneil's mother, who told him that her sons had been arguing earlier that day (38:29-30).

McLin testified that Grace told him the following. Grace saw Hawthorne leave Corneil's basement bedroom holding a gun (38:30). Grace saw Hawthorne and Corneil continue arguing through a door (38:33). Grace saw Hawthorne outside with the gun in his hand (38:34). Grace tried to stop her sons from arguing, but when she

[8] Hawthorne's Br. at 9.

could not stop them, she left the scene (38:34). Grace then heard a loud shot, returned to the scene and saw Corneil seated on the floor (38:34-35). Grace saw Hawthorne then open the back door, still holding the gun (38:34-35). Hawthorne later told Grace that he had taken Corneil to the hospital for a "graze gunshot wound," and Hawthorne apologized to her for shooting his brother (38:36).

Anna Linden, an investigator in the District Attorney's office, testified that she listened to a telephone call from jail between Hawthorne and someone else in which Hawthorne told the listener to "make sure mom and DoNo don't come to court" (38:60-65). Grace also told Linden that she had learned from a neighbor that Hawthorne did not want Grace to go to court (38:66-67). Linden testified that Hawthorne also instructed Corneil not to come to court (38:67). Grace and Corneil did not appear at trial (37:45).

The evidence that Hawthorne was guilty of endangering safety and witness intimidation was overwhelming. Bihler's opening statements and closing argument were not deficient, and they certainly were not prejudicial. Thus, trial counsel was not ineffective.

2. Confrontation Clause.

Hawthorne argues that trial counsel was ineffective for failing to challenge the hearsay evidence admitted under the forfeiture by wrongdoing doctrine as a violation of his right to confrontation.[9] Hawthorne argues the circuit court incorrectly ruled that he was procedurally barred from raising this claim because the claim was previously argued.[10] The State agrees with Hawthorne that the Confrontation Clause claim was not previously litigated, but disagrees that there is any merit to the claim.

"The forfeiture by wrongdoing doctrine is an exception to the Sixth Amendment's Confrontation Clause." *State v. Baldwin*, 2010 WI App 162, ¶34, 330 Wis. 2d 500, 794 N.W.2d 769 (footnote omitted). Under this exception, hearsay statements of a witness who does not testify at trial are admissible if the State proves by a preponderance of the evidence that: (1) the defendant prevented the witness from testifying; (2) the defendant intended to prevent the witness from testifying; (3) the witness is unavailable to testify because the State was unable to secure his presence by process or other reasonable means; and (4) the State made a good faith effort and exercised due diligence to secure the witness's presence. *Id.* ¶¶ 34-39, 46-50. Whether a witness

[9] Hawthorne's Br. at 10-11.

[10] Hawthorne's Br. at 10.

is unavailable for confrontation purposes is a question of constitutional fact that the appellate court reviews de novo. *See State v. King*, 2005 WI App 224, ¶11, 287 Wis. 2d 756, 706 N.W.2d 181.

Here, the State met its burden to demonstrate that Hawthorne forfeited his confrontation right by wrongdoing. The State produced telephone records in which Hawthorne instructed Grace and Corneil not to show up for court (37:11-13, 15, 22). The court found that the State met its burden, concluding that "there is a great deal" of evidence against Hawthorne (37:42). The court stated,

> On each call, the voice identifies himself as Royce, not a real common name. He –
>
> The call is made from a location where the defendant was housed at the time of each call.
>
> He has a great deal of factual information about this particular case, including the date of the prelim, and a – he talks about his mother, he talks about his brothers, he talks about the two of them cannot testify. They are the main witnesses in the case by the State against the defendant.
>
> He talks about, you know, that the – a pressure that – that he is asking the people exert on them so that they don't come.
>
> . . . .
>
> But what we do have is a great deal of anger – and directed at two potential witnesses in this case.
>
> He goes on and on about, fuckin' holler at them, make sure they don't come, make sure his ass doesn't come to court. If he do that, shit's gonna happen. Ain't nothing gonna happen to you if you don't come.

. . . .

> You make sure they don't come to court. Go across the alley and holler at 'em, holler at 'em, holler at 'em. Do what a bitch is supposed to do. Tell my mama to do what a bitch is supposed to do.
>
> The information is very coercive, it's very threatening. And it was meant to be. It wasn't a polite, nice conversation discussing what might happen if somebody doesn't come to court.
>
> This was a directive. This is what you do. You do it right now, you do it right now, you do it right now.

(37:42-45).

The State amply met its burden in demonstrating that Hawthorne forfeited his right to confrontation by wrongdoing. Had trial counsel objected on Confrontation Clause grounds, the objection would have been denied. Trial counsel cannot have been ineffective for failing to make a motion that would have been denied. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (stating that an attorney is not deficient for failing to pursue a meritless claim); *In re Commitment of Taylor*, 2004 WI App 81, ¶17, 272 Wis. 2d 642, 679 N.W.2d 893 (stating that to show prejudice from his counsel's failure to make an objection, defendant must show a reasonable probability the objection would have been successful).

3. Cross-examination.

Hawthorne argues that postconviction counsel should have argued that Bihler was ineffective for failing to ask McLin additional questions.[11]

The circuit court denied Hawthorne's claim as conclusory and undeveloped (71:7). In his Wis. Stat. § 974.06 motion, the sole argument Hawthorne made with regard to Bihler's allegedly deficient cross-examination of McLin was that "[t]rial counsel was ineffective for not asking Detective McLin more about the other person who was also in the victim's house at the time of the alleged shooting on cross-examination" (49:2). In his reply brief in the circuit court, Hawthorne offered more details, arguing that Bihler should have asked McLin about a "Mr. M" that he stated was mentioned in the police reports (68:7-8). In his brief in this court, Hawthorne puts forth additional questions Bihler should have asked McLin.[12]

Hawthorne's shifting reasoning on how counsel was ineffective in his cross-examination of McLin is problematic. Regardless, though, of whether the present incarnation of Hawthorne's claim has been forfeited or waived, his claims – in whatever form – are without merit. As shown *supra*, Hawthorne has shown no prejudice from counsel's cross-examination given the overwhelming evidence of his guilt.

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[11] Hawthorne's Br. at 17-19.

[12] Hawthorne's Br. at 17-18.

4. Reasonable doubt instruction.

Hawthorne argues that trial counsel should have objected to the standard jury instruction on the meaning of reasonable doubt and how the jury should arrive at its verdict.[13] Specifically, Hawthorne objects to the circuit court's instruction to the jury that it is "to search for the truth" (40:15).[14] Hawthorne argues that somehow this alleviated the State of its burden of proof.[15] The State disagrees.

The circuit court instructed the jury that in order to find Hawthorne guilty of first-degree recklessly endangering safety, it must find that the State proved the three elements of the crime beyond a reasonable doubt (40:7-8). The court instructed the jury in a similar manner with regard to witness intimidation (40:9-14). The court told the jury, "The law presumes every person charged with the commission of an offense to be innocent" (40:14). The court stated, "This presumption requires a finding of not guilty, unless in your deliberations you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty" (40:14). And the court told the jury, "The burden of establishing every fact necessary to constitute guilt is upon the State" (40:14). In addition, the court gave the jury the standard instruction on

[13] Hawthorne's Br. at 12.

[14] Hawthorne's Br. at 12.

[15] Hawthorne's Br. at 12.

reasonable doubt (40:15). Nowhere in the court's instructions did the court shift the burden of proof or eliminate the need for the jury to find guilt only when it found the State proved guilt beyond a reasonable doubt.

In sum, Hawthorne has not shown deficient performance or prejudice from Bihler's failure to object to the standard instructions given to the jury. *See Toliver*, 187 Wis. 2d at 360; *In re Commitment of Taylor*, 272 Wis. 2d 642, ¶17.

5. Amended information.

Hawthorne argues that trial counsel should have objected to the amended information. Hawthorne argues that the amendment violated his right to due process.[16] Hawthorne is incorrect.

On the first day of trial, the State moved to amend the information to reflect that one count of witness intimidation concerned Grace and the other concerned Corneil (as opposed to both counts concerning Grace as the earlier information had stated) (39:5). Bihler did not object, stating that he thought it was simply a typographical error and that he and Hawthorne were not surprised by the corrected information (39:5). The court then granted the State's motion to amend (39:5).

Hawthorne has not shown deficiency or prejudice from counsel's failure to object to the amendment. There would have been no merit to any objection to the typographical correction, so that counsel was neither deficient nor was his

[16] Hawthorne's Br. at 13.

decision prejudicial. *See Toliver*, 187 Wis. 2d at 360; *In re Commitment of Taylor*, 272 Wis. 2d 642, ¶17.

6. Joinder.

Hawthorne argues that trial counsel should have objected to the joinder of the charges.[17] He argues that the charges are not "inextricably intertwined that proof of one is impossible without proof of the other."[18] Hawthorne is wrong.

"[J]oinder [of charges] will be allowed in the interest of the public in promoting efficient judicial administration and court fiscal responsibility in conducting a trial on multiple counts in the absence of a showing of substantial prejudice." *State v. Hall*, 103 Wis. 2d 125, 141, 307 N.W.2d 289 (1981).

Here, the charge of recklessly endangering safety was clearly intertwined with the charges that Hawthorne intimidated Grace and Corneil from testifying against him on that charge. Without the recklessly endangering safety charge, there would have been no need for Hawthorne to dissuade his family from testifying. It is clear that the charges here were appropriate for joinder and counsel was not deficient for failing to oppose joinder. In addition, this is not the type of joinder from which a defendant can show prejudice. There is no danger here that the jury would have believed that because Hawthorne was guilty of victim intimidation, he was guilty of recklessly

[17] Hawthorne's Br. at 14-15.

[18] Hawthorne's Br. at 14.

endangering safety, or vice versa. Finally, as stated repeatedly, the evidence against Hawthorne was overwhelming. There was simply no prejudice.

7. Selective prosecution.

Hawthorne also argues that counsel should have objected to the State's selective prosecution, reasoning that because the State charged him with witness intimidation, but not others who assisted him in intimidation, his equal protection rights were violated.[19] Hawthorne is mistaken.

There is no evidence of selective prosecution here. Any motion Bihler would have made in this regard would have been denied. An attorney cannot be ineffective, and a defendant cannot be prejudiced, by counsel's failure to seek relief that has no merit. *See Toliver*, 187 Wis. 2d at 360; *In re Commitment of Taylor*, 272 Wis. 2d 642, ¶17.

8. State's opening statement and closing argument.

Hawthorne argues that the State's opening statement and closing argument were improper and that counsel should have objected to them.[20] Hawthorne is, again, wrong.

"[C]ounsel should be allowed considerable latitude in closing argument." *See State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). "A prosecutor may comment on the

[19] Hawthorne's Br. at 15.

[20] Hawthorne's Br. at 16.

evidence, argue to a conclusion from the evidence, and may state that the evidence convinces him or her and should convince the jury." *State v. Lammers*, 2009 WI App 136, ¶16, 321 Wis. 2d 376, 773 N.W.2d 463. Further, "[a] prosecutor may comment on the credibility of witnesses provided that comment derives from the evidence." *Id.* ¶24.

The State's opening statement, which Hawthorne says was "extremely improper,"[21] merely set forth what the State's evidence would show (38:13-18). Similarly, the State's closing argument did no more than what is allowed: a recitation of the evidence (40:17-25, 34-37). As stated repeatedly, counsel is not ineffective, and a defendant is not prejudiced, from counsel's failure to make a meritless objection. *See Toliver*, 187 Wis. 2d at 360; *In re Commitment of Taylor*, 272 Wis. 2d 642, ¶17. Because there would have been no merit to any objection to the State's opening statement and closing argument, counsel was not ineffective for not objecting to them.

9. Redacted tapes.

Hawthorne also appears to argue that trial counsel should have objected to the court's request that the State make the digital recording of the jail telephone calls "nicer" (37:48).[22] At the hearing on forfeiture by wrongdoing, the court requested that the State fix the recordings so that it would be easier for the jury to follow along with the transcript that had been prepared (37:48-50). The court told the State,

[21] Hawthorne's Br. at 16.

[22] Hawthorne's Br. at 20.

> And then, if you want to play – if you want to play the whole thing, so that they can hear it all in context, you're free to do so. . . . . But there's no way the jury can follow your transcripts unless that's all they're listening to. They can't guess when it's starting, because it's total chaos on there.

(37:50).

Hawthorne has not explained why he believes counsel should have objected to the court's request. He states that the telephone calls had "exculpatory remarks" in them, but he does not say what the exculpatory remarks were.[23] Nor does he explain that the exculpatory remarks were excluded from the jury. His argument on this claim is undeveloped and should be rejected. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that the court "may decline to review issues inadequately briefed").

D. Hawthorne has not demonstrated appellate counsel was ineffective.

Hawthorne's final arguments concern his claim that the court erroneously found that he forfeited his right to confront Grace and Corneil by wrongdoing.[24] Although Hawthorne does not specifically couch this claim in terms of ineffective assistance of appellate counsel, the State will treat them as such because otherwise they would be procedurally barred from review.

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[23] Hawthorne's Br. at 20.

[24] Hawthorne's Br. at 21.

In the trial court, counsel objected to the use of hearsay statements by the unavailable witnesses on the grounds that the voice on the recordings had not been sufficiently authenticated as Hawthorne's and that the State had not shown that Hawthorne's actions caused the witnesses not to appear (37:32-38). On appeal, Hawthorne abandoned these arguments and instead argued that the State had not made a sufficient showing that it had attempted to produce the witnesses for trial (44:2, 5). This court deemed Hawthorne's appellate argument forfeited, but also found the circuit court properly found the witnesses were unavailable (44:8-10).

Hawthorne has shown no prejudice from appellate counsel's abandonment of trial counsel's challenges to the hearsay evidence. As shown *supra*, the State satisfied its burden to prove the application of the forfeiture by wrongdoing exception to the hearsay evidence. Any appellate challenge to the court's finding on that ground would not have been successful. Thus, counsel cannot have been ineffective for failing to pursue a meritless claim. *See Toliver*, 187 Wis. 2d at 360.

***

Because Hawthorne has not shown any deficiency or prejudice from trial court's errors, he has necessarily not shown postconviction counsel was ineffective for failing to raise the issues related to trial counsel. In addition, Hawthorne has failed to demonstrate the ineffectiveness of appellate counsel.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the decision and order of the circuit court.

Dated this 21st day of November, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,888 words.

Dated this 21st day of November, 2014.

_____
Katherine D. Lloyd
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of November, 2014.

_____
Katherine D. Lloyd
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of November, 2014.

_____

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