

FILED

SEP 12 2013

**CAROL G. GREEN
CLERK OF APPELLATE COURTS**

No. 13-109313-A

**IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS**

STATE OF KANSAS
Plaintiff-Appellee

vs.

BREONNA WILKINS
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Richard Anderson, Judge
District Court Case No. 11 CR 2200

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Nature of the Case

A jury convicted Breonna Wilkins of aggravated intimidation of a witness. The district court imposed an eighteen-month prison sentence and granted probation. This is Ms. Wilkins' direct appeal from conviction.

Statement of Issues

- Issue #1:** **Advising or encouraging a person to exercise her constitutional right to maintain a not guilty plea, including the privilege against self-incrimination, cannot evince intent to “thwart or interfere in any manner with the orderly administration of justice.”**
- Issue #2:** **The term “thwart or interfere in any manner with the orderly administration of justice” is unconstitutionally vague or, in the alternative, the jury was not instructed on the meaning of “thwart or interfere in any manner with the orderly administration of justice”**

Statement of Facts

In 2011, law enforcement was investigating a Topeka homicide involving several potential suspects, including F.W., a seventeen-year old girl, and R.W., Breonna Wilkins' boyfriend. (R.8, 163, 176, 181). After R.W. was taken into custody, officers monitored his telephone conversations, including those with Ms. Wilkins. (R.8, 201-02). During an August 2011 conversation, R.W. observed that “if everybody keep their mouth shut, and can't nobody prove nothing.” (R.12, 4).

F.W. was dating Z.A. After she was taken into custody, officers also monitored her calls. During some phone calls between F.W. and Z.A., Z.A. indicated that she had talked to Ms. Wilkins. In a September 21 call, Z.A. indicated the following:

[Ms. Wilkins] just asked about you like, do you know what [F.W.'s] doing? I was like yeah, she's thinking about pleaing [sic] or whatever, and then she was like tell her not to because I've talked to like, uh, a couple different lawyers, and they're saying all the DA is trying to do is get everybody to plea out because they don't have enough evidence against. [(R.12, 24).]

In a November 11 call between F.W. and Z.A., the two were discussing news coverage of plea deals made by some of the co-defendants. Z.A. asked F.W. if she had taken a plea and F.W. responded that she hadn't. Z.A. also said that Ms. Wilkins "was like please tell me [F.W.] didn't take it." (R.12, 35-36).

Based on this information, the state charged Ms. Wilkins with alternative counts of aggravated intimidation of F.W., a witness. (R.2, 59-60). A jury convicted Ms. Wilkins as charged. (R, 10, 437). The district court imposed an eighteen-month prison sentence and granted probation. (R.2, 106-10). This timely appeal followed. (R.2, 101).

Argument and Authorities

Issue #1: Advising or encouraging a person to exercise her constitutional right to maintain a not guilty plea, including the privilege against self-incrimination, cannot evince intent to "thwart or interfere in any manner with the orderly administration of justice."

A conviction stands in opposition of the Due Process Clause, when the state has failed to prove an element beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 361 (1970). Generally, "[w]hen the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011). But the instant case really turns on interpretation of K.S.A. 2012 Supp. 21-5909—specifically the term "thwart or interfere in any manner with the orderly administration of justice." Interpretation of a statute is de novo. *See State v. Cheffen*, ___ Kan. ___, 303 P.3d 1261, 1268 (2013).

The state charged Ms. Wilkins with knowingly preventing or dissuading or attempting to prevent or dissuade F.W. from attending or giving testimony at any civil or

criminal trial . . . authorized by law. . . with an intent to thwart or interfere in any manner with the orderly administration in violation of K.S.A. 2012 Supp. 21-5909. (R.2, 60). At the instructions conference, the state clarified that it alleged that the interference consisted of “[t]rying to influence [F.W.] not to give testimony.” (R.9, 391).

The record does not indicate any communication with F.W. regarding testimony. Viewed in a light most favorable to the state, Ms. Wilkins advised against becoming a snitch by entering into a plea agreement, which of course would incidentally include waiving her privilege against self-incrimination.

In the September 21 call between F.W. and Z.A., Z.A. indicated the following:

[Ms. Wilkins] just asked about you like, do you know what [F.W.’s] doing? I was like yeah, she’s thinking about pleaing [sic] or whatever, and then she was like tell her not to because I’ve talked to like, uh, a couple different lawyers, and they’re saying all the DA is trying to do is get everybody to plea out because they don’t have enough evidence against. [(R.12, 24).]

In the November 11 call between F.W. and Z.A., the two were discussing news coverage of plea deals made by some of the co-defendants. Z.A. asked F.W. if she had taken a plea and F.W. responded that she hadn’t. Z.A. also said that Ms. Wilkins “was like please tell me [F.W.] didn’t take it.” (R.12, 35-36).

The state presented no evidence that Ms. Wilkins directly or through Z.A. attempted to dissuade F.W. from testifying. Viewed in a light most favorable to the state, Ms. Wilkins, through Z.A. attempted to dissuade F.W. from pleading guilty thereby waiving her statutory and constitutional privilege against compelled testimony. The legal question, therefore, is whether such advice or encouragement constitutes intimidation of a witness under K.S.A. 2012 Supp. 21-5909.

In closing argument, the state explicitly equated advice against entering into a plea agreement (and thereby waiving the privilege against self-incrimination) with dissuading a witness:

And the allegation in this case is that this defendant had communications with [Z.A.] with the intent to influence [F.W.] not to take a plea. And in context, what plea means, and part of all of these are cooperating and providing evidence for the State.” [(R.10, 403).]

The state reiterated its theory later telling the jury that “[p]lea, is a euphemism here for appearing and testifying.” (R.10, 431). But, while waiver of the privilege against self-incrimination may be a component of a plea bargain with the state, it is incorrect to *equate* advice on whether to take such a plea bargain with intent to thwart or interfere with the orderly administration of justice.

Consider a hypothetical where a defendant, if testifying truthfully, would confess to a crime, but whom otherwise is unlikely to be convicted based on the state’s remaining evidence. Under the state’s interpretation of K.S.A. 2012 Supp. 21-5909, a defense attorney that advises this hypothetical client to exercise the right to not testify would be guilty of a crime, possibly a felony. In this hypothetical, the client is a “witness” as defined by K.S.A. 2012 Supp. 21-5908(c)(1). In this hypothetical, an attorney giving such advice would be certainly be dissuading or attempting to dissuade a “witness” from testifying at a criminal trial. And in this hypothetical, if the client does not testify, a factually guilty defendant would not be convicted.

Such advice is not a crime because it is not made with “intent to thwart or interfere in any manner with the orderly administration of justice,” an element of the crime, even though it might stymie the prosecution of a person that has committed a crime.

Counsel for appellant could not find any cases interpreting or defining the phrase “intent to thwart or interfere in any manner with the orderly administration of justice.” But it seems absurd that, whatever it means, it encompasses encouraging or advising a person to exercise his or her statutory or constitutional procedural rights. Exercise of statutory or constitutional rights *is part* of the orderly administration of justice, even if it constitutes a hurdle for the prosecutor. There are many reasons a person might advise another to not act as a snitch for the state, some that are more altruistic and some that are more self-serving. But, so long as the person has the right to not testify, encouraging the person to exercise that right cannot evince an intent to interfere with the “orderly administration of justice.” Although cooperating plea bargains may be a convenient mechanism for the prosecution to obtain testimony in some cases, the state is not entitled to such cooperation and discouraging someone from such cooperation, even for self-serving purposes, does not impact the orderly administration of justice.

Because advice to exercise a statutory or constitutional procedural right is not evidence of “intent to thwart or interfere in any manner with the orderly administration of justice,” the record does not contain sufficient evidence to support a conviction for aggravated intimidation of a witness. This Court should reverse the convictions and sentence.

Issue #2: The term “thwart or interfere in any manner with the orderly administration of justice” is unconstitutionally vague or, in the alternative, the jury was not instructed on the meaning of “thwart or interfere in any manner with the orderly administration of justice”

Vagueness

“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of

arbitrary and discriminatory application.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). “In determining whether a statute is void for vagueness, two inquiries are appropriate: (1) whether the ordinance gives fair warning to the persons potentially subject to it, and (2) whether the ordinance adequately guards against arbitrary and discriminatory enforcement.” *State v. Dunn*, 233 Kan. 411, 418, 662 P.2d 1286 (1983). Although it is true that “[i]f there is any reasonable way to construe the statute as constitutionally valid, that should be done,” *State v. Rupnick*, 280 Kan. 720, 125 P.3d 541 (2005)), K.S.A. 21-5413(b)(1)(C) neither provides fair warning, nor does it adequately guard against arbitrary and discriminatory enforcement.

Defense counsel did not object to application of K.S.A. 2012 Supp. 21-5909 on vagueness grounds. But this Court can reach an issue for the first time on appeal if it: (1) involves only a question of law arising on proved or admitted facts that is finally determinative of the case or (2) if consideration is necessary to serve the ends of justice or to prevent denial of fundamental rights. *State v. Puckett*, 230 Kan. 596, 598-99, 640 P.2d 1198 (1982). The instant claim satisfies both prongs of this test. The constitutionality of a statute is purely a question of law over which this Court exercises de novo review. *See State v. Laturner*, 289 Kan. 727, 735, 218 P.3d 23 (2009). And conviction under a vague statute offends the core of the Due Process Clause, a fundamental right.

As noted in the previous issue, appellate counsel could find no cases defining the term “thwart or interfere in any manner with the orderly administration of justice” contained in K.S.A. 2012 Supp. 21-5909. What constitutes the “orderly administration of justice?” In the previous issue, Ms. Wilkins suggested that exercise of statutory or

constitutional rights is part of the orderly administration of justice. But, in the alternative that this Court disagrees and holds that advice regarding the exercise of statutory or constitutional rights can evince intent to “thwart or interfere in any manner with the orderly administration of justice,” the statute does not delineate those circumstances. A person of ordinary intelligence would be left to guess whether their conduct would be a crime under this statute.

Failure to instruct the jury

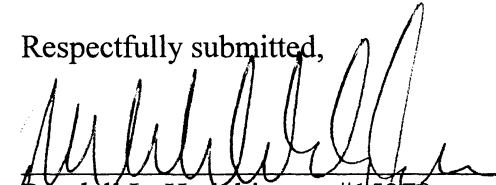
In the final alternative, if this Court holds that there is a reasonable construction of the statute that would provide notice of when exercise of statutory or constitutional rights can evince intent to “thwart or interfere in any manner with the orderly administration of justice,” the jury was not told of that construction. Recently, the Kansas Supreme Court held that failure to provide the jury with a proper definition of “endangerment,” required to make the child endangerment statute constitutional, required reversal. *State v. Cummings*, ___ Kan. ___, ___ P.3d ___ (2013). Similarly, because the jury in the instant case was not instructed regarding any construction this Court might make regarding K.S.A. 21-5909 to save its constitutionality, the conviction in the instant case cannot stand.

Conclusion

Because the exercise of a statutory or constitutional procedural right is part of the orderly administration of justice, advice regarding the exercise of a statutory or constitutional procedural right is also part of the orderly administration of justice. As a result, even if Ms. Wilkins advised F.W. to maintain her not guilty plea, that fact would not support a finding of “intent to thwart or interfere in any manner with the orderly

administration of justice.”

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Randall L. Hodgkinson". The signature is written in a cursive style with a prominent initial "R".

Randall L. Hodgkinson, #15279

Kansas Appellate Defender Office

Jayhawk Tower

700 Jackson, Suite 900

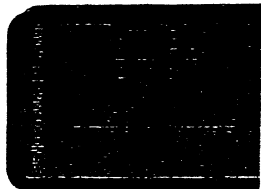
Topeka, Kansas 66603

(785) 296-5484



CONFIDENTIAL

Case # 29482-11



TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT
TOPEKA, KANSAS 66603
NCIC AGENCY IDENTIFICATION # KS0890100

268: Status:

270: Disposition/Arrest

279: Victim's Name

280: Offense(s):

281: Date

282: NARRATIVE:

WEDNESDAY, SEPTEMBER 21, 2011

CALL EXCERPT - 9L0U10P1

FW - [REDACTED]

ZA - [REDACTED]

EXCERPT 1:

FW - What are you talking about?

ZA - Oh, Oh, Babe, guess who called me last night?

FW - Who called you?

ZA - Daquan's sister, what's her name, Breonna?

FW - Breonna?

ZA - Yeah, she called me yesterday.

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT

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FW – What she say?

ZA – And she was like, well, she called me at the 554 number, but originally it wasn't her that called me. It was Alex, and then she was like is this Nookie's girlfriend? I was like yeah, who's this? And then they were like this Alexandria. She used to be around the house all the time. I was like yeah, I know who you are, and then um, uh, she was like I just got my phone back from the Police, too. She was all like, but uh, Daquan's sister wants to talk to you. So, I was like okay. So, she hands, uh, the phone over or whatever, and she was like automatically, she just asked about you like, do you know what Nookie's doing? I was like yeah, she's thinking about pleading or whatever, and then she was like tell her not to because I've talked to like, uh, a couple different lawyers, and they're saying all the DA is trying to do is get everybody to plea out because they don't have enough evidence against, and then she said the only one she knows of that has plead was Bayate.

FW – Really.

ZA – Yeah.

FW – Hmm. I (unintelligible) plead so. (already/didn't)

ZA – Did you really, Babe?

FW – No, I didn't.

ZA – I'm, I'm (?UNK?).

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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FW – Hold on, I about to tell Shay . Um, Daquan's sister called there yesterday, because they just got all their phones back from the um, Police, and then they were like, um, (?UNK?), Police says the DA's trying to get everybody to plea 'cause they have no evidence against anybody. I guess they said (?UNK?). Um, they still don't (?UNK?). Quan's mom (?UNK?).

FW – Whose phone did they take Zerah?

ZA – They took Alexandria's phone.

FW – Alexandria's phone, um, that black girl. She lives in them apartments down the street (?UNK?), where everybody was that night when B got jumped

ZA – Baby.

FW – Yeah.

ZA – I miss you.

FW – I tried to make myself at home, Batiste .

ZA - Babe? Baby?

FW – Hold on.

ZA – Babe? Hello.

FW – Yeah.

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT

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ZA – I miss you.

FW – I miss you too.

ZA – And I love you.

FW – I love you too.

EXCERPT 2:

FW – Really?

ZA – Yeah, and I just miss you and your cute little face

FW – When did, so when did Breonna and them call you?

ZA – They called me yesterday at like 4:30 or 5:00 or something like that.

FW – So why didn't you tell me that when I, when I talked to you?

ZA – Because I forgot, and then I remembered right after we got off the phone. I was like shit, I should have told her, and then I was waiting for you to call like, I didn't think that you were gonna call me today. So, I was gonna tell you tomorrow.

FW – So, what did they say to you?

ZA – What I said to you and then she was like.

FW – (?UNK?) your face. You can eat that (Unintelligible) (peanut /subpoena)

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT

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FW – Huh?

ZA – What?

FW – Tell me again.

ZA – They told me Breonna, okay, Alexandria answered the phone, and they, she asked me if I was your girlfriend, and I said yeah, and then she was like well, uh, Daquan's sister wants to talk to you, and then she told me that she wanted to know what you were doing, and I told her that you were thinking about pleaing, and then she told me that she talked to a couple of lawyers, and that the lawyers say that they're trying, the DA's trying to get everybody to plea out because they don't have enough evidence on anybody, and then after that, I told, she told me that she was gonna write you, but then she didn't think that they would be able to get it to you or whatever because of conflict of interest 'cause she goes up there and sees Daquan and Kevin and Anceo or whatever, whoever all was up there, and then she gave me your number and told me that if I ever needed to talk that I could call her because she goes through the same shit that I'm going through and then yeah, and then I was like alright, and then she asked me if I had any questions for her, and I said no, and then we hung up.

FW – Um no.

ZA – Why?

FW – Zerah how old are you?

ZA – I'm 17, why? Babe? Babe?

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT

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FW – Huh?

ZA – Why?

FW – Why what?

ZA – Why you ask my how old I was?

FW – Because you're still a sophomore, and then there's.

ZA – So. Don't laugh at me.

FW – I'm not laughing. I did laugh, but. I'm sorry, okay. Okay?

ZA – Yes.

FW – I love you.

ZA – I love you too, and at least I'm still doing school. Shit. I could have dropped out.

FW – The girl skipped. She failed 2nd grade.

ZA – Babe?

FW – She failed 9th grade twice.

ZA – Why are telling my business?

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT

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FW – No, I wasn't talking to you. I'm talking about this other girl. She failed 2nd grade and then she failed 9th grade twice and then she said she's 15, and she says she supposed to be a junior.

ZA – Lie.

FW – Hmm?

ZA – That's a lie. She's 15 and she's supposed to be junior?

FW – That's what she claims.

ZA – That's a lie. I'm sorry. I mean, I've never known no 15 year old fucking junior.

FW – Call Breonna and ask her.

ZA – Call Breonna and ask her.

FW – Well somebody needs to slap (?UNK?).

ZA – Hello. Hello, um.

FW – You should call Breonna and ask her.

ZA – And ask her what?

FW – Um, ask her if we're gonna be released on the 14th?

ZA – Okay.

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT

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FW – Right now.

ZA – Baby, I don't know how to three-way, remember.

FW – Oh, my God, you're retarded.

ZA – Well, when you get out, you can show me how to fucking do it.

FW – I'm not showing you nothing.

ZA – Well, I'm sorry that I don't know how to three-way on this stupid phone.

FW – Okay. Hit Menu.

ZA – Hold on, hold on, hold on. There is no Menu.

FW – Hit Options.

ZA – All I see is More, Dial Pad, Speaker, and Mute.

FW – Hit More.

ZA – Okay. Now what?

FW – What did it say?

ZA – Save, Menu, Contacts, Voice Memo, Phone Info, Cancel.

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT

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FW – Hit Cancel.

ZA – Okay.

FW – Now, hit the Dial Pad.

ZA – Okay.

FW – Dial their number.

ZA – I don't know what her number is. I didn't save it to my phone.

FW – Four ze, then hurry and call her. You're retarded. I'm not talking to you.

ZA – Because Baby it's on my Call Log.

FW – I'm done talking.

ZA – Baby, it's on my Call Log.

FW – Mnh-Mnh.

ZA – All I know is it's a 554 number.



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Case # 29482-11

TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT
TOPEKA, KANSAS 66603
NCIC AGENCY IDENTIFICATION # KS0890100

268: Status:

270: Disposition/Arrest

279: Victim's Name

280: Offense(s):

281: Date

282: NARRATIVE:

FRIDAY, NOVEMBER 11, 2011

CALL EXCERPT – BBOU10VG

FW – [REDACTED]

ZA – [REDACTED]

ZA – What's wrong, Baby?

FW – Nothing.

ZA – I read all that shit on CJOnline.

FW – Did you?

ZA – Yeah, it's all over the news, front page in the newspaper.

FW – What did you read?

ZA – About Bayate and everything, but it just said that, um, Duane testified.

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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FW – Testified when?

ZA – Last ni - Yesterday or whatever.

FW – Did he?

ZA – That's what the, that's what Breonna's sister said, I mean, Daquan's sister said.

FW – She told you (?UNK?).

ZA – She, like I texted her because like I seen all this shit and then I asked her, I texted her, I was like hey, what's going on, and she was like, she told me that B tried to run out the court room and, um, Duane was saying in some parts of his statement that you were there, and then in some parts, he was saying that you weren't there.

FW – That Duane?

ZA – Yeah.

FW – So, he was there?

ZA – I'm guessing, but she said that there was a video of it or whatever, but when I went on, I can't remember. She said Channel 7 or Channel 13. I went on both of the websites, and I didn't, no video. It was just a story.

FW – Really?

ZA – Yeah. Is that what Seth and, um, what's his name told me yesterday.

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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TOPEKA POLICE DEPARTMENT SUPPLEMENTAL OFFENSE REPORT

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FW – What?

ZA – That Duane was saying that shit.

FW – They were just like, that he was saying I was there.

ZA – And I guess Duane took the plea that everybody was offered.

FW – Hmm, hmm.

ZA – Baby, you didn't take that shit did you?

FW – Nuh-uh.

ZA – You promise me.

FW – Yes, I promise.

ZA – Okay. I love you so much.

FW – What if I did?

ZA – I'm, I just. Did you?

FW – What if I did?

ZA – I don't know, Babe. Did you?

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

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FW – No, I didn't.

ZA – Okay. I just don't want you to be fucked in the end, you know.

FW – Yeah.

ZA – I love you.

FW – How do you know he took that plea?

ZA – That's, 'cause that's what Breonna said.

FW – Oh.

ZA – And she was like please tell me Nookie didn't take it.

FW – Well, I mean, why would it matter if I took it or not.

ZA – Well, it doesn't matter to her.

FW – I know, I'm not going because I didn't fucking do nothing, you know, so.

ZA – Yeah, I, I know. You were laying right next to me.

Reporting Officer: W. Wilkins
Typed By: D. Liby

Date: 2/29/2012
Copies To: W. Wilkins

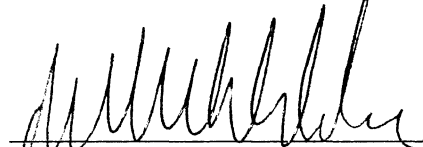
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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Chad Taylor, Shawnee County Attorney, 200 SE 7th, Suite 214, Topeka, KS 66603-3922; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealoffice@ksag.org on the 9 day of September, 2013.



Randall L. Hodgkinson, #15279