STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

vs

JAMAL DEVONTA BENNETT,

Defendant-Appellant.
_____/

Michigan Supreme Court
No. 157936

Court of Appeals
No. 328759

Kent County Circuit Court
No. 15-00869-FC

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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The Court of Appeals answered, "No."
Defendant-Appellant answers, "Yes."
Plaintiff-Appellee answers, "No."

II. WAS THE ERROR IN ADMITTING THE GANG-AFFILIATION EVIDENCE PLAIN ERROR?

The Trial Court answered, "No."
The Court of Appeals answered, "No."
Defendant-Appellant answers, "Yes."
Plaintiff-Appellee answers, "No."

III. DID THE ERRONEOUSLY ADMITTED EVIDENCE, IN CONJUNCTION WITH THE PROSECUTOR'S ARGUMENT IN CLOSING, CONSTITUTE IMPERMISSIBLE CHARACTER EVIDENCE?

The Trial Court answered, "No."
The Court of Appeals answered, "No."
Defendant-Appellant answers, "Yes."
Plaintiff-Appellee answers, "No."

INTRODUCTION

Defendant was convicted by a jury of second-degree murder and using a firearm in the commission of that felony. The jury heard extensive testimony that defendant had gotten into a fist fight with the victim, during which the two struggled over defendant's .357 revolver. Defendant won the fist fight, picked up the handgun, and fired multiple shots, including two fatal shots to the victim's face and abdomen. The jury heard that defendant initially denied any involvement in the shooting, and that he asked one of his friends to "take the case" for him. Based on this overwhelming evidence, the jury rejected defendant's eventual argument at trial that he acted in self-defense or defense of others and convicted him of the charged offenses.

On appeal, the Court of Appeals determined that amateur music videos of defendant and others rapping were improperly admitted at trial, but found any error harmless given the significant evidence of defendant's guilt. The Court of Appeals also held that evidence of defendant's and witnesses' involvement in a street gang (which defendant did not object to at trial) should not have been admitted, but that any error arising from this evidence did not warrant overturning the jury's verdict. When this Court ordered the Court of Appeals to reconsider its decision, the Court of Appeals did so in a lengthy opinion, again finding that the evidentiary errors in the trial were insufficient to overcome the properly admitted evidence that defendant repeatedly shot the unarmed victim.

The issues before this Court are whether the Court of Appeals properly applied the harmless error standard for the preserved objection to the rap videos and whether it properly applied the plain error standard for the unpreserved gang evidence claim. The People have not challenged the Court of Appeals' determination that the evidence was admitted in error, and therefore the only issue is whether the errors were harmless/plain error in light of the other evidence presented at trial. The Court of Appeals properly stated and applied the standards for

analysis. This Court should deny defendant's application for leave to appeal, as there is nothing about the harmless error/plain error analysis employed by the Court of Appeals that requires the Michigan Supreme Court to intervene and alter the law for the bench and bar of this State.

COUNTER-STATEMENT OF FACTS

Defendant, Jamal Devonta Bennett, was charged with second-degree murder, MCL 750.317, and use of a firearm during the commission of a felony, MCL 750.227b. Following a four-day jury trial, held before Kent Circuit Judge Mark A. Trusock, defendant was convicted of the charged offenses (644a; Tr IV, 77).[1] On June 11, 2015, defendant was sentenced to 30 to 100 years' imprisonment on the second-degree murder conviction and two years' imprisonment on the felony-firearm conviction (666a; S Tr, 18).

This case involves a shooting that occurred on March 15, 2013, in an apartment in Grand Rapids. Phillip Williams[2] and his cousin, Jo Harris, shared a birthday, and they gathered with their friends and family to celebrate (279a-280a, 309a; Tr II, 163-164, 193). Phillip's cousin, Tayvonne Williams,[3] and his brother, Derecko Martin, the victim, were in attendance (309a, 313a; Tr II, 193, 197). Tayvonne testified that it was also his 18th birthday that day, and he invited several friends, including defendant, Juan Colon, Deontae Sawyer,[4] Jolan Hines,[5] Clarence Berry,[6] and Omar Lyons,[7] to the party (390a-391a, 393a; Tr III, 41-42, 44). Defendant's friend Anthony Bennett

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[1] The People accept the appendix attached to defendant's supplemental brief. In addition to providing citations to that appendix, the People will include citations in the following format:
Tr I: Jury trial, May 11, 2015
Tr II: Jury trial, May 12, 2015
Tr III: Jury trial, May 13, 2015
Tr IV: Jury trial, May 14, 2015
S Tr: Sentencing hearing, June 11, 2015

[2] Williams's father, also named Phillip Williams, was also in attendance (309a; Tr II, 193). Phillip Williams, Jr.'s nickname was "Milk" (280a; Tr II, 164). To avoid confusion, Phillip Williams, Jr. will be referred to as "Phillip."

[3] Tayvonne's nickname was "Tayweez" or "Tayweezy" (390a; Tr III, 41). He will be referred to as "Tayvonne" to avoid confusion, as he shares a surname with multiple other witnesses.

[4] Sawyer's nickname was "Wooch" (257a; Tr II, 141).

[5] Hines's nickname was "Juju" (257a; Tr II, 141).

[6] Berry's nickname was "Pelle" (439a; Tr III, 90).

[7] Lyons's nickname was "Meezie" (236a, 393a; Tr II, 120; Tr III, 44).

also attended the party, and Anthony[8] invited Sammie Butler-Coleman (449a; Tr III, 100). Additionally, the victim invited Donnell Martin[9] to the party (279a-280a; Tr II, 163-164). Tayvonne's sister, Kabreauna Mitchell, as well as Leroy McKay and Javarius Johnson,[10] also attended (325a, 330a, 366a; Tr II, 209, 214; Tr III, 17).[11]

The record reflects that the party began with close friends and family, and, at some point, Tayvonne's friends, who were younger than most of the other attendees, arrived (310a; Tr II, 194).[12] Donnell testified that he noticed that one of the "young guys" was carrying a semi-automatic pistol, and he reported the issue to Phillip and/or Tayvonne (281a, 396a; Tr II, 165; Tr III, 47).[13] At some point, Donnell pulled Tayvonne and Colon into the hallway and confronted them about the guns. According to Tayvonne, Donnell "was basically trying to kick us out the party" because "people were saying we had guns" (396a; Tr III, 47).[14] Donnell and Colon "exchange[d] words" in the stairway, and Donnell told Colon to leave the party, stating, "Don't nobody need to be here with guns. You know, this is a family gathering" (281a; Tr II, 165).

[8] Anthony will be referred to by his first name, as he shares a surname with defendant.
[9] Donnell Martin's nickname was "Papo" (278a; Tr II, 162). Given that he shares the same surname as the victim, he will be referred to as "Donnell."
[10] Johnson's nickname was "Gubba" (572a; Tr IV, 5).
[11] The People note that the witnesses' testimony was not always clear, partly because some of the witnesses were unaware of the other witnesses' names and therefore could not provide more specific details about who was doing what, and partly because of the chaotic nature of the altercation. Accordingly, the People note that they have attempted to construct an accurate timeline of the evening's events, but certain portions may not be entirely clear.
[12] Donnell testified that, about an hour or so after he arrived at the party, a group of "young guys" arrived (280a-281a; Tr II, 164-165). Defendant, Anthony, Butler-Coleman, and Colon joined the party around 10:00 or 11:00 p.m. (357a-358a, 371a, 450a; Tr III, 8-9, 22, 101).
[13] Tayvonne testified that Hines, Colon, and Lyons were all carrying guns that day (393a; Tr III, 44). Defendant ultimately used a gun that he had been seen with several times before (259a; Tr II, 143) but it is not clear whether he brought that gun with him that day.
[14] Phillip testified that he saw Donnell confronting a "light skinned guy" near the apartment's front door (311a-312a; Tr II, 195-196). Anthony testified that he also observed this altercation, and he identified the younger, "light-skinned guy" as Colon (362a; Tr III, 13).

Tayvonne testified that he told Donnell, "it's my birthday too, I'm celebrating my birthday here, too. And these are all my peoples" (396a; Tr III, 47). Tayvonne testified that Colon stated that the younger group was planning to leave and that he was not "trying to disrespect your fam" (409a; Tr III, 60). However, Donnell testified that Colon said, "You better get this big mother fucker out my face . . . Get this big mother fucker out my face for I put one in him" (281a-282a; Tr II, 165-166). Donell testified that Colon "had his hands on his gun,"[15] and he believed Colon meant that he "wanted to shoot" him (282a; Tr II, 166). Donnell testified that he stated, "y'all can just leave . . . I'm not scared of no damn guns" (282a; Tr II, 166). Colon pulled out his gun and Donnell reacted by punching him in the face (282a, 313a; Tr II, 166, 107).[16] According to Donnell, "I hit him with my left, then I hit him with my right. He went through the wall. And that's when we got to tussling" (282a; Tr II, 166).[17]

Other partygoers, including defendant, the victim, and Butler-Coleman, noticed the commotion in the hallway and joined in (283a, 373a, 377a, 452a-453a; Tr II, 103-104, 167; Tr III, 24, 28). According to Butler-Coleman, after Colon's "head got pushed through the wall," "a lot" of people "rush[ed] out through the door, like, seeing what's going on, pushing, scuffling, punches being thrown. Then it spilled back into the house" (458a; Tr III, 108). Butler-Coleman testified that defendant "went crazy" and was "mad" when Colon got hit (464a; Tr III, 115). Tayvonne testified that, at the time defendant joined the fight, the victim and Donnell were beating Colon (428a; Tr III, 79).

[15] Tayvonne testified that Colon had a .22 caliber handgun (431a; Tr III, 81).
[16] Anthony testified that he saw a "bigger guy" punch Colon (373a; Tr III, 24).
[17] According to Butler-Coleman, he saw Colon's "head get smashed into a wall by the big light-skinned dude" (452a-453a; Tr III, 103-104).

Donnell and the victim continued "tussling" with Colon in an attempt to disarm him, and Donnell testified that he felt someone came and hit him from behind (283a; Tr II, 167). According to Tayvonne, Hines began to "pistol whip" Donnell, which caused the altercation to accelerate (406a, 421a; Tr III, 57, 72).[18] Butler-Coleman testified that "things started getting wild," and people started "rushing out through the door" (457a; Tr III, 108). Hines testified that someone took the gun from him, and he got "jumped" (485a; Tr III, 136). According to Butler-Coleman, the fight continued and involved "pushing, scuffling, [and] punches being thrown" (457a; Tr III, 108). Butler-Coleman testified that, during the fight, he saw a black automatic gun on the floor, and that, at some point, he looked again and the gun was no longer there (457a-458a; Tr III, 108-109).[19]

At some point during the fight, a gunshot was fired.[20] Donnell looked over and saw that the victim had been hit (283a; Tr II, 167). According to Donnell, the victim said, "Unc, I'm hit, Unc, I'm hit" (283a; Tr II, 167). Donnell testified that he and the victim continued "tussling" with the "little boy" and attempted "to get that other boy out" (283a; Tr II, 167).[21] Phillip testified that, after the gunshot, "everybody scattered" (313a; Tr II, 197).

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[18] Hines testified that he went out into the hallway, and, when people started hitting him, he pulled out his gun and hit them (484a-485a; Tr III, 135-136).

[19] Butler-Coleman's testimony regarding when he saw the gun on the floor was not entirely clear. Initially, his testimony seemed to suggest that he saw the gun on the floor *after* the first shot was fired, but later, upon further clarification, he testified that it was "before that first gunshot" (471a; Tr III, 122).

[20] Butler-Coleman testified that "shot number one rang out" after Colon's head was pushed through the wall and after a big group of people joined in the fight (457a; Tr III, 108). Anthony testified that the shot went off "pretty soon" or about thirty seconds after Colon was punched (373a-374a; Tr III, 24-25). Donnell testified that the gun went off during the fight (283a, 313a; Tr II, 167, 197). By contrast, Phillip testified that Donnell did not strike the "light skinned guy" until after the gun went off (320a; Tr II, 204). According to Phillip, as soon as the "light skinned guy" raised the gun, Donnell hit him, and the gun went off (321a; Tr II, 205).

[21] The People note that Donnell's testimony was particularly unclear. He testified that he "got to fighting with somebody," and when the victim was hit by the first shot, the victim "stay tussling

Phillip testified that he ran out the apartment's front door, circled around the building, and reentered the apartment through the back door (314a; Tr II, 198). According to Phillip, when he reentered the apartment, he saw the victim "in the corner fighting with some guys" and Donnell "in the other corner fighting with someone" (314a; Tr II, 198). Phillip joined in the fighting and attempted "to get the guys off" the victim (315a, 323a; Tr II, 199, 207).

At some point, defendant began to "tussle" with the victim over a gun (431a, 533a; Tr III, 82, 184). Sawyer described the gun as a .357 caliber silver revolver with a black grip that was loaded with .380 caliber bullets (536a-537a; Tr III, 187-188). Sawyer testified that he believed he had seen defendant with that same gun in the past (538a; Tr III, 187). Sawyer testified that defendant and the victim were "tussling" or "wrestling" over the gun, and defendant ultimately "got the best of him," got ahold of the gun, and shot the victim (533a; Tr III, 184). Sawyer testified that he was "right there" at the time of the shooting, and he saw defendant shoot the victim (528a; Tr III, 179).[22]

Similarly, Tayvonne testified that he came into the apartment through the back door and saw defendant wrestling with the victim and "tusslin' over the gun" (428a, 431a, 434a; Tr III, 79, 82, 85). Tayvonne testified that defendant pushed the victim, "then stepped back and shot him three times" from about five feet away using a chrome revolver[23] (404a-405a, 411a, 430a-432a;

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with the little boy" (283a; Tr II, 167). Donnell testified that they were "trying to get that other boy out," and that's when he saw "somebody from the doorway shooting" (283a; Tr II, 167). It is unclear to whom Donnell was referring when he said "somebody," "the little boy," and "that other boy."

[22] The People note that Phillip was also struck by the gunfire, first in the forearm and then the hip (315a; Tr II, 199).

[23] Tayvonne testified that Lyons had shown him the same silver revolver earlier in the evening (394a, 430a; Tr III, 45, 81).

Tr III, 55-56, 62, 81-83). Tayvonne testified that the victim was hit in the head, neck, and stomach (406a-407a; Tr III, 57-58).

Clarence Berry, who arrived late to the party, also observed defendant shooting in the apartment. Berry testified that, as he was sitting in the car smoking marijuana before going into the party, he saw "a couple people run outside" (255a-256a; Tr II, 139-140). Berry testified that he suspected a fight was occurring, and, as he walked up to the apartment, he saw defendant shooting a silver .357 revolver in the doorway (256a-260a, 268a; Tr II, 140-144, 152).[24] Berry testified that defendant shot "[m]ore than three" shots (273a; Tr II, 157). Berry testified that he had seen defendant with the same gun three or four times before (259a; Tr II, 143).

Other individuals were present at the time of the shooting but did not specifically identify defendant as the shooter. Donnell testified, while he was "tussling," he heard "somebody from the doorway shooting. I fall back to the wall in the corner, and I'm just seeing the boy just shoot—he's just shooting wildly, you know what I mean?" (283a; Tr II, 167). Donnell testified that he did not see the shooter's face (283a; Tr II, 167). Donnell testified that he looked over toward the victim and saw that he had been shot in the face (283a; Tr II, 167).

Additionally, Mitchell testified that she heard the shots coming from near the front door, and the only person located by the front door at the time was wearing a red jacket (337a; Tr II, 221). Mitchell described the shooter to the police as "six foot to six foot one" with a "[t]hin build," "medium complexion," "thin beard," and a "red hooded sweatshirt" (201a; Tr II, 85). Tayvonne testified that defendant was the only one pictured wearing red in a photograph of the group from that night (402a-403a; Tr III, 53-54).

[24] Berry testified that defendant was wearing a "red sweater" or "hoodie" at the time (267a-268a; Tr II, 152-153).

Butler-Coleman testified to a slightly different version of events. Butler-Coleman testified that, when he reentered the apartment after briefly hiding in the basement after the first shot, he saw Hines "getting just beat up. Beat up crazy,"[25] and defendant standing nearby (458a; Tr III, 109). Butler-Coleman testified that he tried to get defendant to leave the apartment, but defendant refused, saying, "they on [Hines]. They on [Hines]" (458a; Tr III, 109). Butler-Coleman testified that, at some point, he saw defendant with a silver revolver, and defendant said, "Get 'em off. Get 'em off. Or I'm gonna shoot" (458a-459a; Tr III, 109-110). Butler-Coleman testified that, immediately after, he heard gunshots, though he was unable to see where the gunshot came from (463a-464a; Tr III, 114-115).

After defendant shot the victim, he ran outside and got into Berry's car. (261a-262a; Tr II, 145-146).[26] Berry testified that he was "pretty sure" defendant had a gun when he got into the car, given that he saw defendant with the gun in the apartment and that he saw defendant carrying the gun in his hand after he turned to leave (261a, 275a-276a; Tr II, 145, 159-160). Berry testified that he dropped defendant off at Hines's house, then returned to the apartment later looking for Hines, who did not return home after the shooting (263a; Tr II, 147). When he arrived back at the scene, Berry saw the victim "dead" on the floor, lying in the same direction that he saw defendant shooting (263a-264a; Tr II, 147-148).

Robert Jordan, who was walking through the neighborhood at the time of the shooting, testified that he heard "quite a few shots," then saw a few men, including one individual wearing bright red who seemed to be carrying a handgun, jump into a car and speed off (340a-341a, 343a,

[25] It is not clear who Butler-Coleman claims was beating up Hines at this point.

[26] Donnell testified that he "held [the victim] for a minute," then ran outside and saw "all them little young kids just jumping in they cars" (283a; Tr II, 167). Anthony testified that, after the shots were fired, he, Butler-Coleman, Hines, Colon, and McKay got into his car, and defendant got into a different car (366a; Tr III, 17).

344a; Tr II, 224-225, 227, 228). Jordan described the man carrying the gun as wearing "[b]right color red" or a red hoodie, but also testified that all three of the people he saw get into the car were wearing bright red (343a-344a, 347a; Tr II, 227-228, 231).

The victim ultimately died of his injuries. Dr. Stephen Cohle, the medical examiner, testified that the victim suffered three gunshot wounds: one that entered his cheek and passed upward through his brain, one that entered his abdomen, passed through his liver, spleen, and stomach, and exited through his lower back, and one "through-and-through wound" on his left shoulder (580a; Tr IV, 13). According to Dr. Cohle, two of these wounds were fatal (580a; Tr IV, 13).

Defendant was interviewed by Detective Mike Nagel on March 26, 2013 (551a; Tr III,202). In the interview, defendant indicated that he "never saw a gun" at the party and "did not possess a gun" (551a-552a; Tr III, 202-203). Defendant denied any involvement in the fight and in the shooting that night (552a; Tr III, 203). Additionally, Sawyer testified that, while he was incarcerated, he received a kite or jail note from defendant asking whether he or Berry would "take the case" in defendant's place (541a; Tr III, 192). Sawyer testified that he believed this note was from defendant (532a; Tr III, 183).

Defendant was ultimately convicted of second-degree murder and felony firearm and was sentenced as noted above (644a; Tr IV, 77). He appealed his conviction to the Court of Appeals, which affirmed. *People v Bennett (Bennett I)*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2016 (Docket 328759). Defendant then applied for leave to appeal in this Court, and the case was remanded to the Court of Appeals for further consideration of whether the erroneous admission of the music videos and gang-affiliation evidence was harmless. *People v Bennett (Bennett II)*, 501 Mich 964; 905 NW2d 599 (2018). The Court of Appeals

affirmed, finding that the evidentiary errors did not affect the outcome at trial. *People v Bennett (Bennett III)*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2018 (Docket No. 328759). Defendant then filed an application for leave to appeal to this Court, and this Court ordered that oral argument be scheduled on the application. *People v Bennett (Bennett IV)*, 503 Mich 937; 921 NW2d 333 (2019).

Additional facts will be included in the argument section as appropriate.

ARGUMENT

I. THE ADMISSION OF THE RAP VIDEOS WAS NOT OUTCOME DETERMINATIVE.

Standard of Review: This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). When an evidentiary error occurs, the error is harmless unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). An error is outcome determinative when it undermines the reliability of the verdict. *Musser*, 494 Mich at 348. In making this determination, courts must "focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id*. (quotation marks and citations omitted). Preliminary questions of law, such as the interpretation of rules of evidence, are reviewed de novo. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

Discussion: The admission of the rap videos was not outcome determinative.

At trial, the prosecution introduced two rap videos to show the connection between defendant and the other individuals present at the party (147a-148a; Tr II, 31-32). Detective Nagel testified that he did an internet search as a part of his investigation, and he found a video published on YouTube on January 6, 2014, in which defendant, Hines, Colon, Johnson, Sawyer, and Berry perform a rap song called "Shooters" (436a-439a; Tr III, 87-90). Detective Nagel testified that he found another video featuring defendant and Hines, entitled "Cherry Bandana," which was posted on March 13, 2014, and which depicted defendant rapping with a red bandana on his face (440a-442a; Tr III, 91-93).

Defendant bears the burden of establishing that the preserved, nonconstitutional error resulted in a miscarriage of justice, *Lukity*, 460 Mich at 495, and he has failed to meet that burden here. Numerous witnesses at trial gave testimony to support that defendant murdered the victim. Tayvonne testified that he saw defendant and the victim "tusslin' over the gun" before defendant pushed the victim, "then stepped back and shot him three times" using a chrome revolver. Additionally, Sawyer testified that he was "right there" at the time of the shooting, and he saw defendant shoot the victim. Sawyer testified that defendant and the victim were "tussling" or "wrestling" over the gun, and defendant ultimately "got the best of him," got ahold of the gun, and shot the victim. Similarly, Berry testified that, as he walked up, he saw defendant, who was wearing a "red sweater" or "hoodie," shooting a silver .357 revolver in the apartment's doorway. Berry heard defendant shoot more than three shots, and the victim was shot three times. Then, after the shooting, defendant fled the apartment still carrying the gun and took off in Berry's car.

Further, Mitchell testified that she heard the shots coming from near the front door, and the only person located by the front door at the time was wearing a red jacket—and defendant was wearing a red jacket or sweatshirt on the night of the party. A passerby also saw a man wearing bright red holding a handgun run from the apartment after the shots, get into a car, and speed away. Numerous other witnesses present on the night of the murder who did not witness the shooting testified that defendant was present at the night of the shooting and was involved in the altercation that took place immediately preceding the victim's death.

Then, defendant sent a kite or jail message to Sawyer in an attempt to get Sawyer to take the blame for the shooting. Sawyer testified that, while he was incarcerated, he received a kite or jail note from defendant asking whether he or Berry would "take the case" in defendant's place

(541a; Tr III, 192). This further supports that defendant was the one who murdered the victim, and he was trying to escape the consequences by having one of his friends take the blame.

Thus, the record reflects that several witnesses actually saw defendant shoot the victim and various other witnesses saw defendant with a gun and wearing the same clothing as the shooter, and defendant attempted to have his friends cover for him after the fact. Accordingly, the evidence is clear that defendant committed the crime here. Given the strength of the evidence against defendant, it was not more probable than not that the error was outcome determinative or that the videos otherwise undermined the reliability of the verdict. *Lukity*, 460 Mich at 496; *Musser*, 494 Mich at 348.

This is especially true given that defendant's proffered defense, which involved self-defense/defense of others, was not viable given the evidence introduced at trial. MCL 780.972(1) provides, in pertinent part:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

A self-defense/defense of others claim requires evidence that the defendant had a reasonable and honest belief that the use of deadly force was necessary to prevent imminent death or great bodily harm. *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). "A defendant's history and psychological makeup may be relevant to explain the reasonableness of a defendant's belief that he or she was in inescapable danger." *People v Orlewicz*, 293 Mich App 96, 102; 809 NW2d 194 (2011).

Here, the record did not support any self-defense/defense of others claim. As noted above, numerous witnesses testified that they observed defendant and the victim fighting over a gun

(notably, a .357 revolver that Berry had seen defendant possess several times in the past), then defendant got ahold of the gun and shot the victim multiple times. This testimony establishes that defendant had effectively disarmed the victim—and thereby minimized any imminent threat of death or great bodily harm—before shooting the victim. It was not reasonable to believe that defendant was in inescapable danger when he was in control of the gun and the victim was unarmed.

Additionally, although some of the testimony supported that Hines was being beaten at the time defendant fired the shots, the record does not support that it was reasonable to believe that the victim posed an imminent threat to Hines's life such that deadly force was necessary. First, while the record is not entirely clear who was fighting with whom, it does not appear that it was the victim who was beating Hines at the time defendant repeatedly fired the handgun. Sawyer testified that, at the time the victim was shot, the victim was "tusslin' " or "wrestling" with defendant (533a; Tr III, 184). Defendant "[g]ot the best of" the victim and took the gun, then shot the victim in the face (533a; Tr III, 184). There is nothing on the record to support that the victim was fighting with or otherwise posed any threat to Hines at the time defendant fired the gun.

Moreover, even if the victim was beating Hines, there is nothing on the record to suggest that anything beyond an ordinary fist fight was occurring at the time, especially after the gun was removed from the equation. The use of deadly force—firing several shots at the victim—was not proportionate to the danger posed by a fist fight. See *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990) (noting that "an act committed in self-defense *but with excessive force* or in which defendant was the initial aggressor does not meet the elements of lawful self-defense") (emphasis added); *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002) ("The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he

can safely and reasonably do so, for example by applying nondeadly force"). Further, the excessive number of shots fired at the victim, two of which were fatal, supports that the shooting was not done in order to mitigate the threat to defendant or Hines's life. And, as noted by the Court of Appeals, defendant later denied that he was involved in the shooting at all. Had he honestly and reasonably believed his actions were necessary to protect Hines, he would not have denied any involvement, nor would he have asked someone else to "take his case." In short, there was no evidentiary support for defendant's theory of self-defense or defense of others.

Accordingly, given the overwhelming evidence of defendant's guilt and the lack of evidence supporting his self-defense/defense of others claim, any error here was harmless and his conviction should be affirmed.

II. THE ADMISSION OF THE GANG-AFFILIATION TESTIMONY WAS NOT PLAIN ERROR AFFECTING SUBSTANTIAL RIGHTS.

Standard of Review: This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Benton*, 294 Mich App at 195. "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *Musser*, 494 Mich at 348. Defendant did not object to general testimony about his gang affiliation.[27] Unpreserved evidentiary challenges such as this are reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court "will reverse only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence." *Ackerman*, 257 Mich App at 446.

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[27] Prior to the start of trial, defense counsel objected to gang testimony and argued that the incident here was not gang related (112a; Tr I, 100). The prosecutor responded,

> Again, similar to the videos, which are Blood Gang related videos, Your Honor, and the defense of others claim is going to be made, defending a guy named Jolan Hines who is also a Blood member. It's important for the jurors to understand the relationship that those two individuals had, and the relationship that the defendant, Mr. Bennett had with a number of the witnesses who can only be categorized as adverse to the prosecutor's case who are Bloods Gang members, because they—they've—forsworn snitching, for lack of a better word, and assisting police officers in the investigation of this crime. [112a-113a; Tr I, 100-101.]

When asked to clarify his objection, defense counsel responded, "My objection—I don't care if they—it's going to come out that my client was a Blood member, as well as a bunch of his friends. However, I don't want to get into having police officers testify about what gangs do and what gangs don't do, et cetera et cetera" (113a; Tr I, 101). Thus, defendant did not object to testimony about his general gang affiliation, and his challenge is not preserved for appellate review.

Discussion: The admission of the gang-affiliation testimony was not plain error and did not affect defendant's substantial rights.

Evidence that defendant and his friends were affiliated with the Bloods gang was introduced at trial. For example, Colon testified that he was affiliated with Bloods, and he identified himself, defendant, and Johnson in a photograph making a Bloods hand signal. Anthony testified that defendant, Colon, Johnson, and McKay were all associated with Bloods (367a-368a; Tr III, 18-19). Additionally, Tayvonne identified defendant, Johnson, Sawyer, Hines, and Lyons in photographs from the night of the shooting, and testified that the hand signals pictured meant "Bloods" (399a; Tr III, 50).

First, any error in the admission of the gang-affiliation evidence was not plain. *Carines*, 460 Mich at 763. "[T]he word 'plain' is synonymous with 'clear' or, equivalently, 'obvious.' " *Johnson v United States*, 520 US 461, 467; 117 S Ct 1544; 137 L Ed 2d 718 (1997) (quotation marks and citation omitted). "A 'clear or obvious' error under the second prong is one that is not subject to reasonable dispute." *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (quotation marks and citations omitted).

The error in the gang-affiliation evidence was not clear or obvious. This question was subject to reasonable dispute. Our Court of Appeals, in considering this case the first time, found that the gang-affiliation evidence was relevant in light of its tendency to reflect on multiple witnesses' credibility and that the question of prejudice was "a closer issue." *Bennett I*, unpub op at 3. The error here was particularly unclear or unobvious given that defendant specifically agreed that information about his and his friends' gang affiliation could be admitted at trial. Defense counsel stated at the outset of trial, "I don't care if they—it's going to come out that my client was a Blood member, as well as a bunch of his friends." Defendant only objected to "having police

officers testify about what gangs do and what gangs don't do, et cetera et cetera," and, in accordance with this objection, no police or other expert testimony was presented about the common actions or traits of gangs.[28] Given that our Court of Appeals found this to be closer issue and given defendant's agreement that this information could be presented at trial, this issue was subject to reasonable dispute, and therefore the admission of the evidence was not plain, obvious, or clear. *Johnson*, 520 US at 467.

Even if the gang-affiliation evidence constituted plain error, it did not affect his substantial rights. First, as explained above, the evidence against defendant was overwhelming. Several eyewitnesses testified that they saw defendant shoot the victim, and a variety of other witnesses testified that they saw defendant or a person matching defendant's description leaving the apartment with a gun that night. Moreover, this Court "disfavors consideration of unpreserved claims of error" and will reverse "only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 761-762, 763-764 (alterations, quotation marks, and citation omitted). The error in admitting the gang-affiliation evidence did not result in the conviction of an actually innocent defendant. Rather, the record is overwhelmingly clear that defendant shot the victim and that the shooting

[28] Given that defense counsel stated that he "did not care" if this evidence was admitted, this issue has been waived. "A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. To do so would allow a defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998); see also *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (finding that, when a party waives his rights, such as by clearly expressing satisfaction with a trial court's decision, he "may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error"). Even if this issue was not waived, the lack of objection precluded the trial court from ruling on the issue, and defense counsel's acquiescence demonstrates that any error was not obvious.

was not done in self-defense or in the defense of others. The error similarly did not affect the fairness of judicial proceedings: while our appellate courts have found that this evidence should not have been admitted at trial, its admission cannot be found to have rendered the proceedings unfair where defendant expressly agreed that his gang affiliation and the affiliations of his friends could be admitted at trial. The error also did not seriously affect the integrity or public reputation of judicial proceedings. As explained above, the admission of this evidence was a close call, made even closer by defendant's own agreement that the evidence could be admitted. In determining whether evidence is overly prejudicial, a court must engage in the imprecise balance of probative value and prejudicial impact. Where the Court of Appeals found that applying this balancing test was a close call, the error can hardly be found to have seriously affected the integrity or public reputation of judicial proceedings.

Because any error in the admission of the gang evidence did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of judicial proceedings, reversal is not warranted here.

III. THE ERRONEOUSLY ADMITTED EVIDENCE, IN CONJUNCTION WITH THE PROSECUTOR'S ARGUMENT IN CLOSING THAT THE EVIDENCE SHOWED THE "MENTALITY" OF DEFENDANT AND HIS FRIENDS AND THE "LIFESTYLE" THEY LIVED DID NOT CONSTITUTE IMPERMISSIBLE CHARACTER EVIDENCE.

Standard of Review: This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Benton*, 294 Mich App at 195. "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *Musser*, 494 Mich at 348. Unpreserved evidentiary challenges are reviewed for plain error affecting substantial rights. *Ackerman*, 257 Mich App at 446. "Preliminary questions of law, such as whether a rule of evidence or statute precludes the admission of particular evidence, are reviewed de novo, and it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014).

Discussion: The challenged evidence, in conjunction with the prosecutor's argument in closing that this evidence showed the "mentality" of defendant and his friends and the "lifestyle" they lived, did not constitute impermissible character evidence under MRE 404(a) and *Bynum*.

First, the People note that, should this Court agree with the People's arguments in Issues I and II that any error in the admission of the rap videos or gang affiliation evidence was harmless, this question is irrelevant. If the admission of the evidence was harmless, it would still be harmless in light of any conclusions reached on the basis of *Bynum* and MRE 404(a).

Nonetheless, the evidence, in conjunction with the prosecutor's argument in closing, did not constitute impermissible character evidence under MRE 404(a) or *Bynum*. MRE 404(a) provides, in relevant part, that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" except in limited circumstances that do not apply here.

In *Bynum*, this Court considered the admissibility of expert testimony in the context of gang-related violence and found that "expert testimony may be admitted regarding general characteristics of gang culture for an appropriate purpose, such as helping to elucidate a gang member's motive for committing a gang-related crime." *Bynum*, 496 Mich at 626-627. This Court cautioned "that MRE 404(a) limits the extent to which a witness may opine about a defendant's gang membership" and explained that "an expert may not testify that, on a particular occasion, a gang member acted in conformity with character traits commonly associated with gang members" because "[s]uch testimony would attempt to prove a defendant's conduct simply because he or she is a gang member." *Id*. at 627. This Court clarified further, "Even if expert testimony about gang culture may be introduced, however, MRE 404(a) precludes the expert from providing evidence of a gang member's character to prove action in conformity with gang membership." *Id*. at 630. In considering whether the error in gang-affiliation testimony constituted plain error affecting substantial rights, this Court explained that, "[p]articularly when the opinion is proffered by an officer of the law, the error seriously affects the fairness, integrity, or public reputation of the proceedings." *Id*. at 633.

In that case, the prosecution introduced expert testimony about gang culture and opined that the defendant had acted in conformity with his gang membership when he committed first-degree murder. *Id*. at 630-631. This Court found that the expert's testimony "exceeded the limitations of MRE 404(a) when he went beyond discussing the general characteristics of gang membership and gang culture and instead testified that he believed that [the defendant] exemplified, on a particular occasion, the character trait of a gang member who needed to protect territory through violence." *Id*. at 632. The Court considered the evidence against the defendant and agreed with the Court of Appeals's conclusion that the evidence of the defendant's

premeditation was "threadbare, at best," and found that, had the jury not heard the gang evidence, it likely would not have found the defendant guilty. *Id*. at 632-633. The Court also found that "[a]n error of this magnitude satisfies [the third prong of *Carines*] because it inevitably led the jury to find that [the defendant] premeditated in the murder on the basis of his membership in a gang and the asserted character trait that he was thus prone to violence," particularly because the expert witness was a law enforcement officer *Id*. at 633.

In this case, as noted by this Court in its order, then-Assistant Prosecutor Joshua Kuiper referenced defendant's "mentality" and "lifestyle" in his closing statement. Specifically, the prosecutor argued:

> The jury instruction [for the defense-of-others theory] reads, "Second, when he acted the defendant must have honestly and reasonably believed that Jolan Hines, Juan Colon and/or others were in danger of being killed or seriously injured." There is a subjective component to that, and you have no evidence of any belief of the defendant.
>
> * * *
>
> Now, there's an objective component there as well. Reasonably believed. Objectively, the defendant and his buddies came over with three guns. They came over with the *mentality* that you saw in those videos. The Judge is going to read you a limiting instruction of what you can use those videos for. You can use those videos not to show that the defendant is a bad person, therefore you have to convict him, but to show—I'm using them to show what the defendant's intentions were, his modus operandi, his system in—in behaving in doing an act. The instruction you're going to get from the judge.
>
> Very clearly in those videos, the defendant sets forth his basic policy with regards to his buddies. And you see the defendant and Jolan Hines in two of those videos. [605a-606a; Tr IV, 38-39 (emphasis added).]

The prosecutor highlighted certain lyrics in the rap videos and stated, "That, essentially, is a statement what the defendant intends whenever there is a confrontation. The use of gun violence at the slightest provocation. And that's precisely what we had happen in this particular case" (609a; Tr IV, 42).

In his closing, defense counsel argued that the mere fact that defendant and his friends rapped about gun violence, sex, and drugs did not mean that they were actually involved in those things (622a-623a; Tr IV, 55-56). In response, the prosecutor argued,

> The problem with [defense counsel]'s analysis of these videos is Deonte Sawyer is in prison on home invasion. He is in prison on an armed robbery. He's living by that creed that he rapped about.
>
> The problem is Jolan Hines is in jail. He is in jail because he possessed a gun. He admitted to using K2. He admits that he knows the difference between how K2 feels and marijuana feels. They rap about drug use. He admits that he carried a concealed weapon into these parties. He admits he knew Tyrell Harris in February 1st, 2013, and that he may have said, fuck the police. I agree with the *lifestyle* that Tyrell Harris is living when he committed a shooting. I mean, the people in these videos, they are living that *lifestyle*. The defendant, after he knew he shot and killed Derecko Martin, produced that 'Cherry Bandanna' video, which is almost solely about gun violence. [623a-624a; Tr IV, 56-57 (emphasis added).]

The evidence here did not constitute impermissible character evidence under MRE 404(a) and *Bynum*. First, regarding the rap videos, the videos were introduced into evidence and played for the jury, but, unlike in *Bynum*, there was no expert testimony elaborating on the videos' contents aside from identifying some of the individuals pictured in the videos. No evidence was presented to associate certain portions of the videos with any specific character traits. Instead, the jury viewed the rap videos without any outside testimony interpreting the contents of the videos or inferring that the videos were linked to any particular character traits.

Moreover, while the prosecutor expressed that the lyrics in the videos showed the type of lifestyle defendant and his friends led and provided insight into whether defendant had a reasonable belief that shooting the victim was necessary to prevent imminent death or harm, this did not render the videos' contents impermissible character evidence. As the jury was instructed,[29] a prosecutor's arguments are not evidence. As such, MRE 404(a) and *Bynum* are inapplicable to the prosecutor's comments during his closing statement.

[29] See 626a-627a; Tr IV, 59-60.

Similarly, *Bynum* and MRE 404(a) did not prevent the admission of the gang-affiliation evidence. As noted above, this Court stated in *Bynum* that expert testimony about general characteristics of gang culture may only be admitted for an appropriate purpose and specified that, under MRE 404(a), an expert may not testify that a gang member acted in conformity with character traits commonly associated with gang members. *Bynum*, 496 Mich at 626-627. The Court explained that the testimony of law enforcement officers may be particularly problematic. *Id*. at 663.

Here, consistent with defense counsel's pretrial objection, there was no expert testimony about the general characteristics of gang culture, and no one testified that defendant or his friends acted in conformity with any character traits commonly associated with gang members. Further, the law enforcement witnesses in this case did not provide any testimony about the character traits commonly associated with gang members. Instead, the gang-affiliation evidence was presented to demonstrate how the involved individuals knew each other and to explain the nature of their relationship. For example, Johnson testified that he did not know defendant or Sawyer, but the evidence showed that all three individuals were in the same gang together. The fact that defendant and some of the witnesses were affiliated with the same gang helps explain their relationships, including their willingness to join in and fight on the group's behalf, and helps establish the nature of their cohesive acts.

Additionally, the gang-affiliation evidence and the nature of the witnesses' relationships helped explain why some were so reluctant to come forward and provide testimony. Evidence of gang membership has been held admissible to show evidence of bias when it shows the willingness of the members to commit perjury. *United States v Abel*, 469 Mich 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984). This was a theme throughout the trial: in opening statement, the prosecutor

explained that the witnesses were reluctant to give testimony and only begrudgingly admitted their involvement in the shooting after being subjected to investigative subpoenas (142a, 144a-145a; Tr II, 26, 28-29). Several of the witnesses were very hesitant to participate in the investigation and to testify at trial. Berry testified did not want to testify when he was brought in under investigative subpoena and similarly did not want to testify at trial, and the trial court noted that he seemed to be a hostile witness at trial (251a, 266a, 268a-269a; Tr II, 136, 151, 153-154). Butler-Coleman testified that he did not want to come in and testify, and he gave the prosecutors some trouble with the investigative subpoena (460a; Tr III, 111). Additionally, Tayvonne testified that he saw defendant shoot the victim, but he did not initially come forward to report his observations to the police because he "ain't want nothin' to do with it" and "ain't wanna be no snitch" (407a-408a; Tr III, 58-59). Tayvonne also testified that he ain't wanna nothin' to backfire on me, which it did" (408a; Tr III, 59). Tayvonne testified that he did not want to disclose defendant's name because he was afraid of retaliation. Tayvonne testified, "I didn't want nobody comin' after my family, you know? Or none of that" (410a; Tr III, 61). Similarly, Colon testified that he was affiliated with Bloods, and he identified himself, defendant, and Johnson in a photograph showing "[e]verybody throwin' up a gang sign" (513a; Tr III, 164). Colon testified that he did not want to testify and stated that he would not testify against defendant (314a-515a; Tr III, 165-166).

The gang-affiliation evidence was presented here not to show general characteristics of gang culture—which is especially apparent given that no evidence was presented relating to gang culture/character traits commonly associated with gang members—but to show the nature of the relationship between the witnesses and explain why they were so hesitant to cooperate with the investigation and were so reluctant to testify against defendant at trial. The evidence was relevant

to show why several witnesses had been initially willing to commit perjury in an investigative subpoena to avoid implicating defendant.

Moreover, the prejudicial impact of the gang-affiliation evidence here was significantly lower than in *Bynum* because, in this case, defendant was convicted of second-degree murder, not first-degree murder. To convict defendant of first-degree murder, the prosecution was required to prove that defendant committed a "willful, deliberate, and premeditated killing." MCL 750.316(1)(a). "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). To convict a defendant of second-degree murder, MCL 750.317, the prosecution is required to prove: "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Bergman*, 312 Mich App 471, 487; 879 NW2d 278 (2015) (quotation marks omitted). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. To prove second-degree murder, it is not necessary to establish that the defendant actually intended to harm or kill. "Instead, the prosecution must prove the intent to do an act that is in obvious disregard of life-endangering consequences." *Id*.

In *Bynum*, the Court found that defendant was prejudiced by the improper propensity testimony. Specifically, the Court found that the error affected the outcome of the proceedings given that the evidence of an essential element of first-degree murder—premeditation—was "threadbare, at best." *Bynum*, 496 Mich at 622. The Court held that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings" because "it inevitably led the

jury to find that [the defendant] premeditated in the murder on the basis of his membership in a gang and the asserted character trait that he was thus prone to violence." *Id.* at 633. The Court also found that, "[b]y proffering an opinion that [the defendant] exhibited the character trait of violence commonly associated with gang members to explain how [the defendant] allegedly premeditated in the murder, [the expert] gave the jury a separate reason for rejecting [the defendant]'s self-defense claim." *Id*. at 634.

Unlike the defendant in *Bynum*, who was convicted of first-degree murder, defendant was convicted of second-degree murder. While first-degree murder requires evidence of premeditation, second-degree murder only requires proof that the defendant acted with malice, i.e., intended to do an act that is in obvious disregard of life-endangering consequences. While improper gang-affiliation evidence might have direct bearing on a defendant's premeditation (e.g., as in *Bynum*, where the evidence of defendant's propensity for violence supported that his crime was premeditated), it does not have the same bearing on a defendant's malice. The fact that defendant was in a gang did not make it more or less likely that he intended to do an act that was in obvious disregard of life-endangering consequences. It is common knowledge among gang members and non-gang members alike that shooting a gun at a close range aimed at another person has life-endangering consequences, and defendant's intent was shown, not by the fact that he was in a gang, but by the evidence that he took the gun, pointed it at the victim, and shot the victim multiple times. Defendant's gang affiliation had no bearing on his knowledge of the life-endangering consequences of shooting at a person or his intent to shoot.

Additionally, defendant's gang affiliation had no bearing on his self-defense/defense of others claims. Under other facts, a defendant's propensity for violence shown through testimony about common traits associated with gang members could bear on a self-defense/defense-of-others

claim, as this type of evidence could tend to make it more likely that the defendant did not honestly and reasonably believe that deadly force was necessary, but rather was acting in conformity with his propensity for violence. However, here, as explained above, the record did not support a self-defense/defense-of-others claim. Because defendant had no viable self-defense/defense-of-others claim to begin with, there was no danger that any evidence of defendant's gang affiliation improperly affected these defenses.

Finally, as explained in Issues I and II, any error in the admission of the rap videos or gang affiliation evidence was harmless. This is equally true whether it was excluded under MRE 404(a)/*Bynum* or whether it was excluded under MRE 402 and MRE 403. As explained above, the evidence of defendant's guilt was overwhelming, and he had no viable self-defense/defense of others claim. Because the admission of evidence here was harmless, defendant's application for leave to appeal should be denied and his convictions affirmed

RELIEF REQUESTED

THEREFORE, for the reasons stated herein, the People respectfully pray that defendant's application for leave to appeal be DENIED.

Respectfully submitted,

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Dated: October 11, 2019

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