Pursuant to Court Order

Commonwealth of Kentucky
Supreme Court
No. 2012-SC-000219-D

PAMELA S. BARTLEY — **APPELLANT**

On Discretionary Review from the Court of Appeals
Case No. 2010-CA-001640-MR

Appeal from Rowan Circuit Court
v. Hon. Janet Coleman, Special Judge
Indictment No. 09-CR-00117

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal was not checked out and that a copy of the Brief for Commonwealth has been served April 30, 2013, as follows: by mailing to the trial judge, Hon. Janet Coleman, Special Judge, Kentucky Administrative Office of the Courts, Senior Status Program Administrator, 100 Millcreek Park, Frankfort, Kentucky 40601; by sending electronic mail to Hon. Keen Johnson, Commonwealth Attorney, 44 West Main Street, Mount Sterling, Kentucky 40353; and by mailing to Hon. W. Robert Lotz, Attorney for Appellant, 120 West 5th Street, Covington, Kentucky 41011, and Hon. Derek R. Durbin, Attorney for Appellant, 26 Audubon Place, Fort Thomas, Kentucky 41075.

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INTRODUCTION

Pamela S. Bartley, hereinafter "Appellant," was convicted of manslaughter in the second degree and sentenced to eight years in prison following a jury trial in Rowan Circuit Court. She appealed to the Kentucky Court of Appeals, raising three claims of error. The Court of Appeals affirmed the Appellant's conviction in a 2-1 decision. This Court granted discretionary review.

Note Concerning Citations

The record on appeal consists of seven volumes of transcript of record and ten CD's. The volumes of record are numbered one through seven and will be cited as "TR" with the volume and page number. The video record will be cited as "VR" with the date and time index. There are two CD's of trial proceedings for December 14, 2009. Citations to this day will refer to "Disc 1" or Disc 2." References to the Appellant's brief will be noted as "Appellant's Brief" with the page number.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary. The issues raised are adequately addressed by the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On the morning of Tuesday, July 31, 2007, Kentucky State Police troopers arrived at the home of Carl Bartley and his wife, the Appellant, in Jeffersonville, Kentucky. VR 12/9/09, 1:34:45-1:35:40. The officers responded to a call from Carl's extended family about concern for his safety and whereabouts. Id. When they arrived they met members of Carl's extended family outside and were given a key to the residence. Id. at 1:25:55-1:36:25. The officers did not locate anyone during an initial sweep of the residence, but did notice Carl's vehicle in the garage. Id. at 1:45:20-1:46:00.

The officers checked the garage again at the family's insistence and subsequently discovered Carl's body. VR 12/9/09, 1:40:50, 1:46:30, 1:48:15. It was lying on the floor in the garage between two cars, wrapped in blankets with boxes on top of it. VR 12/8/09, 2:26:08-2:26:45; VR 12/9/09, 1:40:50, 1:48:15. It was later determined that Carl had been killed by a gunshot to the back of the head. VR 12/9/09, 10:03:05.

The Appellant was subsequently indicted for murder by a Montgomery County Grand Jury. TR1 30. The case proceeded to trial in Montgomery County but resulted in a mistrial when a jury could not be seated. TR3 229. The case was then transferred to Rowan County and assigned a special judge. TR3 245-246; TR4 13. An eight-day trial began on December 7, 2009, during which the Commonwealth presented substantial circumstantial evidence of the Appellant's motive, means, and opportunity to kill Carl.

As to the Appellant's motive, it was established that Carl and the Appellant had been married thirty-eight years (VR 12/14/09 Disc 1, 1:32:00), but had a tumultuous relationship. They often argued and fought, sometimes rising to the point that

they drew guns on each other. VR 12/10/09, 11:31:55, 3:50:35; VR 12/14/09 Disc 1, 2:51:00-2:51:50, 3:05:00; VR 12/15/09, 1:21:50-1:22:50.

Their marital problems escalated in early July 2007 when the Appellant learned that Carl had been having an affair for five years. On or around July 1st, Carl's girlfriend Katherine Lee called the Appellant and - according to the Appellant - told her about the affair, that she had pictures of Carl and herself having sex that she was going to put on the internet, that she was pregnant by Carl, that they did drugs together, and that she had been places with the Appellant's grandchildren. VR 12/10/09, 2:12:45-2:14:05. The Appellant was "hysterical" after learning of the affair. VR 12/15/09, 2:31:30.

Over the course of July the couple fought frequently over the affair. On July 10, 2007, Kentucky State Police Trooper Aaron Brown responded to a domestic dispute call from Carl. VR 12/10/09, 3:15:10-3:15:45. Upon arriving at the residence Trooper Brown learned that the couple had been arguing most of the day over Carl's girlfriend. Id. at 3:16:15, 3:16:35.

Carl's sister, Sandy Ballard, saw the couple several times from mid to late July. VR 12/8/09, 11:21:30. Sandy testified that the Appellant was angry over the situation with Katherine Lee and was constantly "on" Carl by "fussing and saying things." Id. at 11:21:50. There were also indications that Carl was afraid of the Appellant. At some point during July Carl went to the Montgomery County Attorney's office to inquire about an emergency protective order, but was told the office did not handle such matters. VR 12/8/09, 2:06:45-2:07:20, 2:07:40.

In addition, various witnesses testified that the Appellant threatened to kill Carl on numerous occasions. The Appellant told Beverly Barkley on July 4, 2007, that Carl was worth more to her dead than alive. VR 12/10/09, 9:45:35. The Appellant told co-worker Bill Johnson several times that if she could not have Carl "nobody else will." VR 12/14/09 Disc 1, 1:30:55, 1:37:50.

Carl's sister, Linda McGuire, testified to threats occurring the Friday before Carl's death. VR 12/8/09, 3:24:45-3:26:52. While sitting at a picnic table outside the couple's residence, the Appellant was crying and told Linda she was going to kill both Carl and his girlfriend. Id. at 3:24:55-3:25:36. She said in reference to Katherine Lee: "She thinks she f***** Carl . . . when I take this .38 and ram it up in her and it goes off it'll be the best f*** she ever got." Id. at 3:26:15-3:26:48. On the same occasion Sandy overheard the Appellant say she would kill Carl "before someone else gets him." Id. at 11:22:20.

The weekend before Carl's death the couple's then eight-year-old grandson Dalton Bartley stayed at their home. VR 12/14/09 Disc 1, 2:37:50, 3:14:53, 3:15:35. According to Dalton, Carl and the Appellant fought "the whole time" over the affair. Id. at 2:39:33. During the visit the Appellant told Dalton "I can't take it anymore." Id. at 2:58:50. Dalton also saw the Appellant pull a gun on Carl while Carl was sitting on the couch. Id. at 2:43:45-2:46:00. Dalton ran upstairs because he was scared and didn't know what was going to happen. Id.

On Sunday evening before Dalton returned home the Appellant was crying and told Dalton "I'm going to kill him." VR 12/14/09 Disc 1, 2:40:00-2:41:40. When

Dalton's mother, Kristy Bowling, picked him up that evening she heard the Appellant say to Carl, "Do you want to tell her or do you want me to tell her?" Id. at 1:46:20. However, nothing further was said when Kristy told them not to talk in front of Dalton. Id. at 1:46:40. During trial Carl's sister Linda testified that Carl intended to leave the Appellant on Monday morning. VR 12/8/09, 4:35:30.

The evidence at trial also established that the Appellant had the means to kill Carl. During Carl's autopsy a bullet was retrieved from the left frontal lobe of his brain. VR 12/9/09, 10:08:15. The bullet was determined to have been fired from a .38 or .357 magnum handgun. Id. at 1:15:05. The Appellant owned a .38 handgun. VR 12/8/09, 3:56:42, 3:57:22; VR 12/10/09, 10:32:52, 11:32:00, 2:49:05. She had carried it for years and referred to it as her "baby." VR 12/8/09, 3:57:22, 3:58:18; VR 12/10/09, 10:33:22, 11:32:20, 2:26:50, 2:50:00; VR 12/14/09, 1:28:30. In addition, Carl had a .38 and there was testimony that firearms were common in the Bartley home as Carl bought, sold, and traded in guns. VR 12/10/09, 10:48:50-10:49:40, 1:50:25-1:52:40.

The evidence further established that the Appellant had the opportunity to kill Carl. The couple was at home together on the morning of Monday July 30th. VR 12/8/09, 3:30:50-3:31:25. Linda spoke to Carl on the phone around 9:30 a.m. and made plans to meet him at 5:00 p.m. to move a trailer. Id. At around 1:00 p.m. both Carl and the Appellant's vehicles were seen in their driveway. Id. at 1:39:50, 1:40:40-1:40:50.

Around 2:00 p.m. Virgil Parks called the residence to speak to Carl. VR 12/10/09, 9:12:40-9:14:35. The Appellant answered instead and told him they were having what Parks understood to be marital "problems." Id. at 9:15:25, 9:16:00. Around

2:28 p.m. the Appellant went to the bank and made a $5000 withdrawal from Carl's business account. Id. at 9:28:15, 9:29:05, 9:30:30. She then briefly stopped to pick up a cell phone charger from Dalton at 3:15 p.m. before driving two hours to her daughter Carla Haas's house in Melbourne, Kentucky. Id. at 2:06:45-2:07:35, 3:24:10, 3:29:30.

Carl did not meet Linda at 5:00 p.m. and she was unable to contact him. VR 12/8/09, 3:35:15, 3:35:45-3:36:55. She was concerned and eventually called the Appellant. Id. at 3:37:00. The Appellant indicated that they had been in a "heated argument" that morning and that he had left. Id. at 3:37:10. She later told Linda he was probably "with that whore." Id. at 3:44:45. The Appellant received several calls throughout the evening about Carl, but she and Carla were not concerned. VR 12/10/09, 3:30:30, 3:31:05-3:32:00. The Appellant stayed overnight at Carla's residence. VR 12/15/09, 4:40:10. She returned home with Carla and Carla's husband the next morning after Carl's body was discovered. Id. at 4:23:10-4:26:30.

In addition to evidence of the Appellant's motive, means and opportunity, the Commonwealth was permitted to play - over the Appellant's objection - a recorded interview between the Appellant and investigating detective Larry Bowling of the Kentucky State Police. VR 12/15/09, 9:04:15-10:45:30. The interview took place outside of the Appellant's residence on September 7, 2007, after an incident in which the Appellant alleged that Katherine Lee's brother, Thomas Lee, shot at her and her son Bradley Bartley's vehicle and knocked out the rear window with a baseball bat. VR 12/15/09, 2:57:00-3:02:30.

During the non-custodial interview the Appellant attempted to implicate Thomas Lee in Carl's murder despite initially indicating that she only wanted to talk about the events of that day. VR 12/14/09 Disc 1, 9:40:38, 9:43:48, 9:48:28, 9:49:20, 10:03:24, 10:04:05. When Detective Bowling subsequently asked questions regarding the murder investigation the Appellant remained silent. See e.g., Id. at 10:18:00, 10:26:58, 10:56:36, 11:00:00.

The defense called a number of witnesses at trial, but the Appellant did not testify. The theory of the Appellant's defense was that she had no involvement in Carl's death, and that there were a number of people who had a motive to kill Carl. This included Katherine Lee, Thomas Lee, and several people that Carl had testified against in criminal matters where Carl received deals in exchange for his testimony. VR 12/17/09, 9:37:00-9:43:50. The defense emphasized a lack of physical evidence connecting the Appellant to the crime, and asserted that Detective Bowling did not adequately investigate the case or other possible suspects. Id. at 9:50:25-9:53:10, 9:53:30-9:57:05, 9:36:00-9:43:50.

At the conclusion of the evidence the jury was instructed on intentional and wanton murder, as well as the lesser offenses of manslaughter in the first degree, manslaughter in the second degree, and reckless homicide. TR6 165-168. Following deliberations the jury found the Appellant guilty of manslaughter in the second degree and imposed a sentence of eight years. TR6 170, 173. The trial court sentenced the Appellant accordingly. TR7 238-241; VR 1/19/10, 10:46:05.

The Appellant appealed her conviction to the Court of Appeals, raising the following claims of error: (1) that the trial court erred in permitting the introduction of her recorded interview with Detective Bowling; (2) an unpreserved claim that there were improper references during Detective Bowling's testimony and the Commonwealth's closing argument to her silence in the recorded interview; and (3) an unpreserved claim that the trial court erred in permitting evidence concerning several handguns which were established not to have been the murder weapon.

On March 9, 2012, the Court of Appeals rendered a 2-1 not-to-be-published opinion affirming the Appellant's conviction, Bartley v. Commonwealth, Case No. 2010-CA-001640.[1] The Appellant subsequently filed a motion for discretionary review which this Court granted.

Further facts will be presented as they become relevant to arguments

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[1] The opinion was written by Judge Nickell. Judge Taylor concurred in the opinion. Judge Combs dissented and filed a separate opinion.

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE RECORDED INTERVIEW INTO EVIDENCE.

The Appellant first asserts that she was denied a fair trial due to the introduction of the recorded interview with Detective Bowling. Appellant's Brief at 8, 10. Specifically, she argues that the admission of the interview violated her right against self-incrimination since it contained occasions in which she did not respond to certain questions. Id. at 10. However, as will be shown, given the nature and characteristics of the interview the trial court properly exercised its discretion in allowing its admission into evidence.

A. Factual Background

As noted in the Counterstatement, the interview in question occurred outside the Appellant's residence on September 7, 2007. VR 12/14/09 Disc 1, 9:32:40. On that date the Appellant reported an incident in which Katherine Lee's brother, Thomas Lee, allegedly fired upon, and knocked out the window of a vehicle in which the Appellant and her son Bradley were riding. VR 12/15/09, 2:57:00-3:02:30. Officers responded to the Appellant's home. Id. at 3:01:50-3:02:30. Detective Bowling was not investigating the incident but received a call that the Appellant wanted to talk to him. Id.

at 11:32:55, 11:49:50. When he arrived at the Appellant's residence he met her in the driveway. Id. at 11:50:00. The interview took place in his cruiser. Id.[2]

Before beginning the interview the Appellant called her attorney to see if she could talk about "this incident" - referring to the alleged assault by Thomas Lee. VR 12/14/09 Disc 1, 9:35:20. Detective Bowling then read the Appellant Miranda[3] warnings and asked if she understood her rights. Id. at 9:36:10. The Appellant stated that she "fully" understood and wanted to talk about the incident of that day. Id. at 9:36:30-9:36:45.

The Appellant proceeded to describe the alleged incident (VR 12/14/09 Disc 1, 9:37:33-9:40:30), but subsequently directed the conversation to her belief that Thomas Lee was involved in Carl's murder. Id. at 9:40:28. She made statements suggesting that Thomas Lee killed Carl, and questioned whether the gun he allegedly used in the September 7th incident could be tested to see if it was the murder weapon. Id. at 9:43:48, 9:48:28, 9:49:20, 10:03:24.

Following her implication of Thomas Lee, the Appellant and Detective Bowling discussed further matters such as the Appellant's relationship with Carl. VR 12/14/09 Disc 1, 9:52:05. Detective Bowling thereafter asked several questions relating to the murder investigation. He questioned the Appellant about when she went to her

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2 The Appellant asserts that Detective Bowling arrived at the scene of the alleged assault and thereafter "transported Pamela Bartley in order to speak with her." Appellant's Brief at 8. These statements are uncited and do not appear to be supported by the record.

3 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

daughter Carla's house on July 30, 2007, and also about the location of her .38 handgun. See e.g., Id. at 10:18:00, 10:56:36. The Appellant generally gave no response each time the detective asked these questions. See e.g., Id. at 10:18:00, 10:26:58, 10:56:36, 11:00:00. At various points Detective Bowling also discussed a theory about the murder case to which the Appellant remained silent. See e.g., Id. at 11:15:00. However, the Appellant continued to talk about other matters aside from the September 7th incident, and continued to variously implicate Thomas Lee in Carl's murder. See e.g., Id. at 11:31:25, 11:59:45. The interview lasted approximately one hour and forty minutes. Id. at 9:32:50-12:02:40.

On the first day of trial the court entered an order denying the Appellant's "motion to suppress the audio interview between Detective Bowling and the Defendant." TR4 98. In the order the trial court found no damaging admissions by the Appellant, and found that Thomas Lee was someone whom the Appellant believed to be connected with the murder case. Id. The court denied the motion since the two events appeared to be related to one another. Id.

Several further discussions were held regarding the admissibility of the interview. VR 12/7/09, 8:55:45-9:05:04; VR 12/14/09 Disc 1, 9:03:35-9:22:50, 9:31:35-12:17:55, 12:57:45-1:21:00. During these discussions the defense asserted that instances in which the Appellant remained silent created the risk that the jury would use her silence against her. VR 12/14/09 Disc 1, 12:09:40.

After lengthy discussions and a thorough review of the interview with the parties in chambers (VR 12/14/09 Disc 1, 9:31:35-12:17:55), the trial court ruled that the

interview was admissible. Id. at 1:19:05-1:21:00. The interview was played for the jury.[4] VR 12/15/09, 9:05:00-10:44:00.

B. The Trial Court Properly Exercised Its Discretion in Admitting the Interview.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. Anderson v. Commonwealth, 231 S.W.3d 117, 119 (Ky. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Similarly, Section 11 of the Kentucky Constitution provides, in part, as follows: "In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself. . . ."

In the landmark decision of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court established a means of protecting the Fifth Amendment privilege against self-incrimination by requiring that certain warnings be given to criminal suspects who are subjected to custodial interrogation. These warnings include informing the suspect of the right to remain silent.

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[4] The interview was played in its entirety with the exception of a portion at the end in which the Appellant is placed under arrest based on an apparent warrant for items previously found in her car, and a portion mentioning an incident in which the Appellant previously shot Carl in the back. VR 12/14/09 Disc 1, 12:04:00.

384 U.S. at 444. If a defendant exercises the right, this Court has recognized that "[t]he Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody." Hunt v. Commonwealth, 304 S.W.3d 15, 35-36 (Ky. 2009) (citing Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and Romans v. Commonwealth, 547 S.W.2d 128, 130 (Ky. 1977)).

Here, the Appellant asserts that the introduction of the recorded interview constituted an impermissible use of her *pre-arrest* silence since it contained her occasional silence in response to certain questions. To support her argument the Appellant relies on this Court's recent decision concerning pre-arrest silence in Baumia v. Commonwealth, --- S.W.3d ----, 2012 WL 5877581 (Ky. 2012), which had not been decided at the time the Court of Appeals rendered its opinion in this case.

In Baumia, an officer asked the defendant to submit to a portable breathalyzer test, to which the suspect responded: "My father told me not to talk to the f---n' police, see my attorney." Id. at *3. The defendant was not in custody at the time and had not been given Miranda warnings. Id. Thereafter, at the defendant's trial the officer testified during the Commonwealth's case-in-chief to the defendant's invocation of her rights. Id. This Court found that such testimony was improper, holding that evidence of the defendant's pre-arrest, pre-Miranda silence, was not admissible in the Commonwealth's case-in-chief since it had been induced by official compulsion. Id. at *5.

In this matter, the recorded interview clearly contains instances in which the Appellant remains silent in response to certain questions from Detective Bowling. However, this matter is distinguishable from Baumia in that it involves a case of *selective silence.*

Initially, it should be noted that the Appellant was given Miranda warnings by Detective Bowling before the interview even though they were not required since she was not being subjected to custodial interrogation. Miranda, *supra*, 384 U.S. at 444. As noted, after speaking with her attorney on the phone the Appellant was informed of her rights, indicated that she "fully" understood, and said that she wanted to talk about the incident of that day. VR 12/14/09 Disc 1, 9:36:10-9:36:45. This statement was sufficient for the Appellant to invoke her right to remain silent with respect to all matters except the September 7th incident. See, Berghuis v. Thompkins, 130 S.Ct. 2250, 2260, 176 L.Ed.2d 1098 (2010) (recognizing that a "simple, unambiguous statement[]" is all that is necessary to invoke one's right to remain silent).

However, by proceeding to voluntarily direct the conversation to matters other than the September 7th incident, the Appellant implicitly waived her right to remain silent. In Thompkins, the United States Supreme Court held that "[w]here the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." Id. at 2262. "[T]he law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." Id. Here, the

Appellant "fully" understood her rights and voluntarily chose to discuss matters beyond the incident of September 7th. Thus, contrary to the Appellant's claim, she waived her right to remain silent.

As such, the statements made by the Appellant during the interview were properly admissible. Interwoven throughout this admissible conversation were instances in which the Appellant declined to answer particular questions. While this scenario does not appear to have been previously addressed in Kentucky, various courts have permitted evidence of a defendant's "selective silence" such as occurred here.

In United States v. Burns, 276 F.3d 439, 441 (8th Cir. 2002), the defendant waived his Miranda rights during a post-arrest interrogation and responded to questioning. During the interview the defendant did not respond to a certain question and "just looked" at those questioning him. Id. He then responded to further inquiries before eventually indicating that he did not want to answer any more questions. Id. The Eighth Circuit Court of Appeals upheld the admission of evidence of the defendant's silent response and eventual refusal to answer further questions, holding that "where the accused initially waives his or her right to remain silent and agrees to questioning, but "subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused."" Id. at 442 (quoting United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992)).

Likewise, in United States v. Bonner, 302 F.3d 776 (7th Cir. 2002), a defendant charged with mail fraud and theft of government funds submitted exculpatory

documents during the course of the investigation. Id. at 778-779. However, the defendant subsequently declined to discuss the items with an investigating agent. Id. at 779. At trial the prosecution was permitted to introduce evidence of his pre-arrest silence. Id. at 780. The Seventh Circuit Court of Appeals upheld the evidence, recognizing that "if a defendant starts down an exculpatory path by providing statements, and then clams up and refuses to expand on those statements, the latter silence may be introduced at trial." Id. at 783-784 (citing United States v. Davenport, 929 F.2d 1169, 1174 (7th Cir. 1991)). The court recognized that "it would not serve the criminal justice system to allow defendants to use the Fifth Amendment both as a shield and as a sword, answering questions selectively and preventing the prosecution from mentioning such selectiveness at trial." Id. at 784.[5]

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[5] The Appellant notes and the Commonwealth acknowledges that certain courts have held that a defendant's selective silence ***is*** protected by the Fifth Amendment. See Appellant's Brief at 13-14 (citing, e.g., United States v. Williams, 665 F.2d 107 (6th Cir. 1981)). Nevertheless, in addition to the cases discussed in the argument above, a number of other courts have recognized that selective silence ***is not protected***. See e.g., United States v. Pando Franco, 503 F.3d 389, 396-397 (5th Cir. 2007) (finding that a defendant who answered questions after receiving Miranda warnings waived the right to prevent the entire conversation - including implicit references to his silence contained therein - from being used against him as substantive evidence of guilt); United States v. Goldman, 563 F.2d 501, 503 (1st Cir. 1977) (noting that "[a] defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to."); People v. Hart, 828 N.E.2d 260, 273 (Ill. 2005) (noting that "numerous cases . . . have sanctioned the admissibility of testimony regarding a defendant's silence or nonverbal conduct during questioning subsequent to a valid waiver of rights."); Commonwealth v. Senior, 744 N.E.2d 614, 621-622 (Mass. 2001) (finding no error in permitting evidence and prosecutor comment on a defendant's refusal to answer certain questions where the defendant had waived Miranda rights

Here again, this matter involves a case of selective silence. As the trial court noted, the Appellant "wanted to talk about part of the circumstances, but not all of the circumstances." VR 12/7/09, 9:02:00. Like the defendant in Bonner, *supra*, the Appellant started down an "exculpatory path" by attempting to implicate Thomas Lee in Carl's death. VR 12/14/09 Disc 1, 9:40:38. She was willing to discuss matters beyond the September 7th incident including the murder investigation to the extent that someone else was involved, but then "clammed up" when it came to matters she did not want to address. See e.g., Id. at 10:18:00. This justified placing the entire interview before the jury. As noted in Burns, *supra*, these periods of silence following a waiver of the right to remain silent should be admissible as part of an otherwise admissible conversation.[6] 276 F.3d at 442.

Furthermore, the circumstances surrounding the interview here also weigh heavily in favor of its admission. The Appellant initiated the interview and wanted to talk

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and did not invoke rights by simply remaining silent); Rogers v. State, 721 S.E.2d 864, 871-872 (Ga. 2012) (finding that evidence of a defendant's refusal to answer a particular question during custodial interview after having waived Miranda rights was admissible); State v. Torres, 858 A.2d 776, 784-785 (Conn. App. 2004) (upholding the admission of a narrative police report showing that a defendant was silent in response to certain questions during an interview on the grounds that selective silence is not protected silence).

[6] While the Appellant may assert that she re-invoked her rights by remaining silent in response to certain questions, this is incorrect. Thompkins, *supra*, recognized that simply remaining silent is insufficient to invoke one's rights - there must be an unambiguous invocation of the right. 130 S.Ct. at 2259-2260. See also, Buster v. Commonwealth, 364 S.W.3d 157, 162 (Ky. 2012) (holding that "[a] defendant must unequivocally assert her right to remain silent in order to cut off questions from the police.")

to Detective Bowling. VR 12/15/09, 11:32:55, 11:49:50. She had spoken to her attorney and fully understood her rights. VR 12/14/09 Disc 1, 9:35:20, 9:36:30. She was certainly aware that Detective Bowling was investigating Carl's death, and clearly desired to implicate Thomas Lee in the crime despite initially indicating that she only wanted to talk about the September 7th incident. The Appellant was not under arrest or in custody - rather, she was outside her house. VR 12/15/09, 11:50:00. She knew that she could have stopped the interview at any time yet chose to continue selectively talking to Detective Bowling when in her interest to do so.

After meticulously reviewing the interview with counsel and carefully considering arguments, the trial court, in its discretion, allowed its admission. In doing so the court noted as follows:

> [A]s I look through my notes and as I listened this morning again I found so many instances where she had again participated in the interview . . . I don't think it became something which was like a one-sided series of questions by the police and she perhaps had indicated she wanted to talk to her lawyer and they rode roughshod over her and just persisted in the interview. I don't think that's what happened . . . I think that from reviewing it again she participated and appeared to understand her right not to respond very well and continued to draw the attention of the police officer to the subject mater that she wanted him to address.

VR 12/14/09 Disc 1, 1:19:05-1:20:05.

Based upon this discussion, the trial court properly exercised its discretion in admitting the recorded interview into evidence. As discussed, the Appellant waived her right to remain silent by voluntarily discussing matters beyond the September 7th

incident, and her selective silence constituted part of an otherwise admissible conversation. There was no error. The final judgment should be affirmed.

C. Alternatively, Any Error Was Harmless.

Should the Court find that the interview was improperly admitted, any error in its admission may nevertheless be deemed harmless. Generally, "[a]n error is harmless where, considering the entire case, the substantial rights of the defendant are not affected or there appears to be no likely possibility that the result would have been different had the error not occurred." Greene v. Commonwealth, 197 S.W.3d 76, 84 (Ky. 2006) (citations omitted). Since the Appellant has alleged a constitutional violation the error must be "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Talbott v. Commonwealth, 968 S.W.2d 76, 84 (Ky. 1998).

Here, the Commonwealth's evidence of the Appellant's motive, means, and opportunity to kill Carl was compelling and pointed directly to her guilt. As discussed in the Counterstatement, the couple fought throughout the month of July over Carl's affair, to the point where Carl twice sought protective help from authorities. See, VR 12/8/09, 2:06:45; VR 12/10/09, 3:15:10. The Appellant made threats to kill Carl on multiple occasions to multiple people (VR 12/10/09, 9:45:35; VR 12/14/09 Disc 1, 1:30:55), including emotional threats to kill him mere days before his death. VR 12/8/09, 11:22:20, 3:24:55; VR 12/14/09 Disc 1, 2:40:00-2:41:40.

In addition, the Appellant carried the type of handgun likely used in the shooting, and had pulled a .38 handgun on Carl during an argument days before his death.

VR 12/8/09, 3:56:42; VR 12/14/09 Disc 1, 2:43:45-2:46:00. There was compelling testimony from the couple's grandson Dalton regarding the incident, and evidence that the Appellant confessed to then eight-year old Dalton that she "couldn't take it anymore" and was going to kill Carl. VR 12/14/09 Disc 1, 2:40:00-2:41:40, 2:58:50.

Furthermore, the evidence indicated that the couple fought the Sunday evening before Carl's death (VR 12/14/09 Disc 1, 1:46:20, 2:40:00-2:41:40), that they were together on Monday morning at their residence (VR 12/8/09, 3:30:50-3:31:25), that they had a "heated argument" that morning (Id. at 3:37:10), and that Carl's body was found in their garage the next morning (VR 12/9/09, 1:48:15). The jury also heard that the Appellant abruptly left town on Monday afternoon while withdrawing $5000 from Carl's business account (VR 12/8/09, 3:44:10; VR 12/10/09, 9:29:05, 9:30:30), and that she spent the night at her daughter's house despite there being a number of calls expressing concern for Carl's whereabouts (VR 12/15/09, 4:40:15). These circumstances clearly pointed to the Appellant's guilt, and the admission of the recorded interview did not impact or influence the result.

Moreover, any error in the interview's admission is shown to be harmless through the jury's verdict. The Appellant was charged with murder, and the Commonwealth vigorously argued during closing argument for the jury to find her guilty of intentional murder. VR 12/17/09, 10:40:50, 10:52:30, 11:01:20, 11:06:55, 11:08:45. However, the jury returned a verdict on the much lesser offense of manslaughter in the second degree despite substantial evidence suggesting that the Appellant intended to kill Carl. This result shows that the admission of the recorded interview could not have

prejudiced the jury against her. Thus, any error in the admission of the interview was harmless beyond a reasonable doubt. The final judgment should be affirmed

II.

THE APPELLANT'S ARGUMENT THAT HER SILENCE IN THE RECORDED INTERVIEW WAS IMPROPERLY REFERENCED DURING DETECTIVE BOWLING'S TESTIMONY AND THE COMMONWEALTH'S CLOSING ARGUMENT IS NOT PRESERVED. IF THE COURT CONSIDERS THE MATTER, ERROR, IF ANY, DOES NOT WARRANT RELIEF UNDER RCr 10.26.

The Appellant further argues that there were improper references to her silence in the recorded interview during Detective Bowling's testimony and the Commonwealth's closing argument. Appellant's Brief at 15.

A. The Appellant's Claims are Not Preserved and Need Not be Considered.

Initially, this Court need not consider these arguments as they are not preserved for appellate review. While the Appellant has requested review for a palpable error under Rule of Criminal Procedure ("RCr") 10.26, it is well-recognized that "[t]he palpable error rule . . . is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review." Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002) (citing RCr 9.22). "The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived." Id.

Pursuant to RCr 10.26, this Court ***may*** consider an unpreserved error if it is a "palpable error" which affects the Appellant's "substantial rights" and resulted in

"manifest injustice." The required showing for a palpable error resulting in manifest injustice is "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." Id. at 4. Moreover, what a palpable error analysis really "boils down to" is whether there is a "substantial possibility" that the result would have been different without the error. Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006). "If not, the error cannot be palpable." Id.

B. If the Court Considers the Matter, Error, If Any, Does Not Warrant Relief Under RCr 10.26.

The Appellant first argues that Detective Bowling impermissibly commented on her pre-arrest silence during his testimony following the playing of the recorded interview. Appellant's Brief at 15. The Appellant points to Detective Bowling's testimony that the Appellant "refused to answer" when asked certain questions. She also points to his indications that he never got a denial or any help from the Appellant. VR 12/15/09, 11:52:15, 11:52:30, 11:54:45; Appellant's Brief at 15.

However, for the same reasons discussed in Argument I, *supra*, Detective Bowling could properly testify that the Appellant refused to answer certain questions. As in Bonner, *supra*, 302 F.3d 783-784, the Appellant started down an exculpatory path by attempting to implicate Thomas Lee in Carl's murder. As in Burns, *supra*, 276 F.3d at 442, she effectively waived her right to remain silent, proceeded to tell Detective Bowling

her "story," and then simply refused to answer during certain points of their conversation without re-invoking her rights. As such, Detective Bowling could properly testify to the Appellant's selective silence during the course of their conversation.

The Appellant further challenges portions of the Commonwealth's closing argument. Specifically, she claims error with comments indicating that the Appellant had not answered certain questions during the interview, that she did not cooperate with Detective Bowling, and that Detective Bowling had done all he could in investigating the case with no help from Carl's immediate family. VR 12/17/09, 10:56:30, 11:02:40, 11:05:15; Appellant's Brief at 16.

It is well-established that "[o]pening and closing statements are not evidence and wide latitude is allowed in both." Wheeler v. Commonwealth, 121 S.W.3d 173 (Ky. 2003) (citing Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987)). During closing arguments "[g]reat leeway is allowed to *both* counsel . . . . It is just that - *an argument*. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter, 744 S.W.2d at 412 (emphasis in original).

Here, the Commonwealth's comments fall within the proper bounds of closing argument. The Commonwealth's reference to the Appellant refusing to answer certain questions was a proper comment on the Appellant's selective silence. In addition, while the Commonwealth mentioned that the Appellant did not cooperate with police, she likewise indicated that the Appellant did not have to do so. VR 12/17/09, 11:04:50. Finally, the comments regarding the lack of help from Carl's immediate family were in

response to defense counsel's attacks on the sufficiency of Detective Bowling's investigation. See generally, VR 12/17/09, 9:36:00-9:50:25. It is well-established that a prosecutor is permitted to "respond to matters raised by the defense." Commonwealth v. Mitchell, 165 S.W.3d 129, 132 (Ky. 2005) (citing Hunt v. Commonwealth, 466 S.W.2d 957 (Ky. 1971)).

Alternatively, if the Court finds error in either the testimony or closing argument, it must again be emphasized that relief under RCr 10.26 is only proper upon a finding of a palpable error resulting in ***manifest injustice***. Moreover, when reviewing claims of error in closing argument, "[t]he required analysis, by an appellate court, must focus on the overall fairness of the trial and not the culpability of the prosecutor." Slaughter, *supra*, 744 S.W.2d at 411-412. Reversal based on misconduct of the prosecutor is only warranted if the misconduct is so improper, prejudicial, or egregious as to render the entire trial fundamentally unfair. Brewer, *supra*, 206 S.W.3d at 349.

In this matter, the Appellant received a fundamentally fair trial. Furthermore, relief under RCr 10.26 is not warranted since there is ***no*** possibility, let alone a ***substantial*** one, that the result would have been different without the alleged error.

Again, the Commonwealth presented compelling evidence of the Appellant's motive, means and opportunity to kill Carl. The testimony regarding the Appellant's selective silence and the comments during closing argument were not necessary to a finding of guilt, and their absence would not have tipped the scales in favor of acquittal as the Appellant suggests. Appellant's Brief at 20. The Appellant's claim that

the jury would have acquitted her since they would have been able to focus on all the other suspects fails. Id. There was simply no showing by the defense that the potential suspects they raised had the means or opportunity to kill Carl, even assuming that they may have had some motive to harm him. The result would have been the same.

Therefore, given these considerations as well as considering the jury's verdict in light of the evidence, error, if any, did not result in a palpable error resulting in manifest injustice under RCr 10.26. Nor was any error so improper, prejudicial, or egregious as to render the trial fundamentally unfair. The final judgment should be affirmed.

III.

THE APPELLANT'S ARGUMENT REGARDING EVIDENCE OF HANDGUNS THAT WERE TESTED AND EXCLUDED AS THE MURDER WEAPON IS NOT PRESERVED. IF THE COURT CONSIDERS THE MATTER, ERROR, IF ANY, DOES NOT WARRANT RELIEF UNDER RCr 10.26.

The Appellant finally argues that evidence at trial relating to several 9 mm handguns was irrelevant and inflammatory and did not amount to "harmless error." Appellant's Brief 17, 20. In responding to this claim, the Commonwealth will first set forth the pertinent factual background and applicable standard of review for unpreserved claims of error. The Commonwealth will then establish that error relating to this evidence, if any, does not rise to the high standard necessary for relief under RCr 10.26.

A. Factual Background

Firearm and tool mark examiner Jessica Akers from the Kentucky State Police Eastern Regional Forensic Laboratory testified during the Commonwealth's case-in-chief. VR 12/9/09, 11:28:25-11:28:55. Ms. Akers testified that the bullet she received for testing was fired from a .38 or .357 handgun. Id. at 11:31:30, 1:15:05. She also indicated that she had been provided with several firearms, and mentioned that she received a Colt .38 special revolver. Id. at 11:32:55-11:33:30. The defense objected and a bench conference ensued. Id.

At the bench, the parties discussed that the .38 should not have been mentioned pursuant to a prior stipulation the parties entered into. VR 12/9/09, 11:33:38-11:34:05. After a brief recess the parties reached an agreement that Ms. Akers would be asked if she tested a 9 mm handgun to avoid further mention of the .38. Id. at 12:03:25-12:05:35. It was agreed that she would also be asked whether any of the guns she tested fired the bullet in question. Id.

When testimony resumed Ms. Akers stated that she tested a 9 mm handgun. VR 12/9/09, 1:07:25. She was then presented with a bag containing a 9 mm and identified it as the gun she tested. Id. at 1:10:15-1:11:35. She also indicated that she examined a second 9 mm handgun. Id. at 1:11:38. She testified that neither of the 9 mm handguns were used to fire the bullet that was submitted for testing. Id. at 1:12:35-1:13:00. She subsequently testified several further times that none of the firearms she examined fired the bullet she had received. Id. at 1:13:55, 1:19:38, 1:21:10.

Later during the Commonwealth's case, the Appellant's grandson, Kyle Thompson, identified the 9 mm that Ms. Akers previously identified as belonging to the Appellant. VR 12/10/09, 11:33:10-11:33:50. Thompson testified that he had taken it following Carl's death and given it to Detective Bowling. Id. at 11:41:10. It was later established that the second 9 mm handgun Ms. Akers referenced belonged to Katherine Lee's friend, Melissa Anderson, and was given to Detective Bowling by Ms. Anderson during an interview. VR 12/14/09 Disc 2, 4:12:15.

B. The Matter is Not Preserved for Appellate Review.

Initially, it must again be emphasized that the Appellant's argument is not preserved for appellate review. The Appellant's claim of error relates to evidence concerning the two 9 mm handguns (See Appellant's Brief pg. 2), for which no objection was made. This lack of preservation was recognized by the Court of Appeals in its opinion and by the Appellant in her brief before the Court of Appeals. Slip Opinion pg. 13 ("She admits this error is unpreserved but again requests palpable error review."); Appellant's Court of Appeals Brief pg. 15 ("This issue is reviewed as being "palpable error" committed by the Trial Court, pursuant to RCr 10.26."). Nevertheless, the Appellant now appears to be confusing the palpable error and harmless error standards by arguing that the evidence relating to handguns was not "***harmless.***" Appellant's Brief at 17, 20. However, since no objection to the 9 mm handgun evidence was made, the harmless error rule - RCr 9.24 - and its interpretive caselaw have no application here.

Review of the Appellant's unpreserved claim, if any, must only be pursuant to RCr 10.26.[7]

As discussed in Argument II, *supra*, this Court may consider an unpreserved error under RCr 10.26 if it is a "palpable error" which affects the Appellant's "substantial rights" and resulted in "manifest injustice." The required showing is "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Martin, *supra*, 207 S.W.3d at 3. The defect in the proceeding must be determined to have been "shocking or jurisprudentially intolerable" (Id. at 4), and there must be a "substantial possibility" that the result would have been different without the error. Brewer, *supra*, 206 S.W.3d at 349.

C. If the Court Considers the Matter, Error, If Any, Does Not Warrant Relief Under RCr 10.26.

This Court has held that "weapons, which have no relation to the crime, are inadmissible." Major v. Commonwealth, 177 S.W.3d 700, 710 (Ky. 2005). However, that holding has been clarified in the unpublished decision in Goodman v.

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[7] The Appellant's reference to "harmless" error appears to be in response to the Court of Appeals's conclusion that "any error in this circumstance was harmless beyond a reasonable doubt." Slip Opinion pg. 15 (citing RCr 9.24). In Martin, *supra*, this Court noted that "reviewing courts should endeavor to avoid mixing the concepts of palpable error and harmless error." 207 S.W.3d at 5. The Court further explained that "[a] claim of palpable error presupposes a lack of preservation and such claims are held to the standard described herein. Harmless error, on the other hand, presupposes preservation and an erroneous trial court ruling, but nevertheless permits a review court to disregard it as non-prejudicial." Id.

Commonwealth, 2008 WL 2167538 (Ky. 2008).[8] In Goodman, this Court declined to find as a general principle that "guns are only admissible at trial if they were used in the crime." Id. at *5-6. Instead, the Court suggested that weapons not used in the offense may be admissible if relevant for a proper purpose, such as to show intent. Id. See also, Harris v. Commonwealth, 384 S.W.3d 117, 123 (Ky. 2012) (recognizing that "[w]eapons that are known to have no connection to the crime . . . are ***generally*** not admissible") (emphasis added).

In this matter, the evidence simply established that Ms. Akers tested a 9 mm handgun belonging to the Appellant as well as a second 9 mm handgun belonging to Melissa Anderson, and determined that neither weapon fired the bullet in question. There was no discussion or indication as to how the weapons may have been connected to the crime. However, even if the 9 mm's were not sufficiently connected to the shooting to allow for admission, the Appellant cannot show that she was prejudiced by the evidence, let alone show the "egregious" prejudice necessary for relief under RCr 10.26. See Brewer, *supra*, 206 S.W.3d at 349 (recognizing that palpable error requires prejudice more egregious than that occurring in reversible error).

Initially, it appears that evidence of a handgun belonging to the Appellant which was tested and excluded as the murder weapon would actually benefit the Appellant in that it tends to suggest that she was not the killer. Again, the Appellant's defense was that she had no involvement in her husband's death. Thus, in a sense the

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[8] This case is unpublished and is cited pursuant to CR 76.28(4). The Westlaw version of the opinion is attached in the appendix of this brief.

evidence was not prejudicial but exculpatory, and potentially would have been introduced by the defense if not by the Commonwealth.

Next, there was no risk of jury confusion in introducing evidence relating to the 9 mm's. The Commonwealth did not try to mislead the jury or suggest in any way that the Appellant's 9 mm was the murder weapon.[9] Ms. Aker's testimony was clear that the bullet in question was fired from a .38 or .357. VR 12/9/09, 1:15:05. The two 9 mm's were simply mentioned - ***with the Appellant's agreement*** - as handguns that had been tested and determined not to have fired the bullet. See VR 12/9/09, 12:03:25-12:05:35.

In addition, the jury would not have been shocked that the Appellant owned a 9 mm handgun or considered it as evidence of a criminal or violent disposition. Gun ownership generally is not a crime, nor a "wrong" as defined by KRE 404(b). See McQueen v. Commonwealth, 339 S.W.3d 441, 448 (Ky. 2011). Furthermore, the jury had been informed by defense counsel that the "the Bartley family had numerous firearms," and had been questioned by counsel during voir dire regarding any bias or prejudice they may have towards gun ownership. VR 12/7/09, 2:45:05, 2:45:55. The jury also heard evidence that the Appellant was legally licensed to carry a concealed firearm, that she obtained the 9 mm after their home was broken into, and that she kept it under her pillow. See VR 12/10/09, 10:47:55, 2:27:25, 2:50:35, 3:42:35; VR 12/15/09, 1:24:25,

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[9] The Appellant asserts that the 9 mm was introduced and published to the jury. Appellant's Brief at 2. However, she provides no citation to the record to support this claim. The Appellee can find no point in which the 9 mm was actually admitted as an exhibit or published to the jury. It should also be noted that it was ***not*** provided to the jury during their deliberations. VR 12/17/09, 11:14:10-11:14:50.

2:52:35; VR 12/16/09, 10:06:05. Accordingly, the jury would not have been prejudiced against the Appellant simply because she owned a 9 mm handgun or because guns were kept in the Bartley home.

Finally, it cannot be said that there is a ***substantial*** possibility that the result would have been any different absent the alleged error. Brewer, *supra*, 206 S.W.3d at 349. Ms. Akers's testimony regarding the tested handguns and the introduction of the Appellant's 9 mm was a brief side-note in an eight-day trial. There was no argument by the Commonwealth that because the Appellant owned a 9 mm handgun she must have killed Carl. And, the 9 mm was only once briefly mentioned in the Commonwealth's lengthy closing argument. VR 12/17/09, 10:56:20.

Moreover, as discussed, Ms. Akers testified that the bullet that killed Carl was fired from either a .38 or .357. VR 12/9/09, 1:15:05. There was evidence that both the Appellant and Carl had a .38, as well as substantial evidence that the Appellant had both the motive and opportunity to kill Carl. Thus, the result would not have changed even if the evidence regarding the tested handguns and the Appellant's 9 mm had not been introduced.

While the sight of a gun could possibly be alarming to jurors, there was nothing inflammatory in the evidence - or in its use - so to be ***shocking or jurisprudentially intolerable***. Martin, *supra*, 207 S.W.3d at 4. Therefore, error, if any, does not rise to the extreme standard of palpable error resulting in manifest injustice. Relief under RCr 10.26 is not warranted. The final judgment should be affirmed.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals and the final judgment of the Rowan Circuit Court should be affirmed.

Respectfully Submitted

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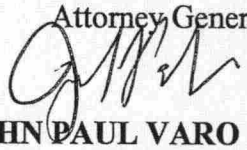

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