No. 72728-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LELAND JORDAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Suffering from a medical crisis and perceiving that hospital staff were improperly depriving him of his pain medication, Leland Jordan purportedly threatened to go get a gun and shoot everyone. Prosecuted for felony harassment, Mr. Jordan waived his right to counsel. After about a six-month lapse in the proceedings, the State added a charge for bail jumping. Without counsel, Mr. Jordan entered an Alford guilty plea. Because there was a substantial change in circumstances requiring a new waiver of counsel and Mr. Jordan did not adequately renew his waiver, this Court should reverse. Additionally, the Court should reverse because there was not a factual basis to support the plea to felony harassment, the offense of felony harassment is unconstitutional, and the charging document alleging bail jumping was defective.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth Amendment to the United States Constitution and article one, section twenty-two of the Washington Constitution, Mr. Jordan was deprived of his right to assistance of counsel.

2. After a significant change in circumstances, the trial court erred in not conducting a new, full inquiry into whether Mr. Jordan was waiving his right to assistance of counsel.

3. In violation of the Fourteenth Amendment to the United States

Constitution and article one, section three of the Washington Constitution, Mr. Jordan's plea violates due process.

4. The trial court erred in finding there was a factual basis for Mr. Jordan's plea to felony harassment.

5. The offense of felony harassment violates the First Amendment to the United States Constitution and article one, section five of the Washington Constitution.

6. In violation of the Sixth Amendment to the United States Constitution and article one, section twenty-two of the Washington Constitution, the charging document did not provide adequate notice of all the elements of bail jumping.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When there is a substantial change in circumstances during the proceedings, the court must procure a new unequivocal waiver of counsel. A substantial change in circumstances may arise when there is a lapse in the proceedings, new charges, or the defendant asks for counsel. Shortly after his case started, Mr. Jordan validly waived his right to counsel. After Mr. Jordan was released months later, there was about a six-month lapse in proceedings. The State added a charge for bail jumping. After the lapse and additional charge, Mr. Jordan made statements indicating he

wanted counsel. Was there a substantial change in circumstances requiring a renewal of Mr. Jordan's waiver of counsel?

2. To be effective, the record must show that a waiver of counsel was knowing, voluntary, and intelligent. After the lapse in proceedings, the court conducted a cursory inquiry into whether Mr. Jordan wished to continue to represent himself. Mr. Jordan answered yes, but explained that he did not think he was going to be able to represent himself properly. The court's inquiry occurred before arraignment on the bail jumping charge and before Mr. Jordan stated he wanted counsel. Was Mr. Jordan deprived of his right to assistance of counsel?

3. To comply with constitutional due process, there must be a factual basis to support a plea. The offense of felony harassment requires proof that the victim was the target of coercion or intimidation and that the victim reasonably feared the defendant would carry out the threat to kill. According to the statement of probable cause, which was offered as the sole factual basis to support the charge, the purported victim only stated that she "witnessed" Mr. Jordan's threatening behavior, not that she was the target of it. She also did not state that she feared Mr. Jordan "would" carry out his threat. Rather, she stated she feared that Mr. Jordan "could" carry out his threat. Given these defects, is there a lack of a factual basis for Mr. Jordan's plea to felony harassment?

4. The First Amendment, as interpreted by the United States Supreme Court, requires proof that the defendant subjectively intended to make a threat. As interpreted by our State Supreme Court, the offense of felony harassment does not require proof of subjective intent. Is the crime of felony harassment unconstitutional?

5. A charging document must fairly allege all essential elements. An essential element of bail jumping is proof that the defendant had notice of a required court appearance and that the defendant knowingly missed this court date. The charging document alleged that Mr. Jordan had notice of a subsequent court appearance and that he committed the offense on or about January 17, 2014. The document, however, did not allege that Mr. Jordan knew he had to appear in court on January 17, 2014. Was the information constitutionally defective?

D. STATEMENT OF THE CASE

Leland Jordan was at Harborview Medical Center in Seattle on September 19, 2013. CP 95. At this time, Mr. Jordan was 61 years old and seeking medical treatment. CP 95, 162. Mr. Jordan, an African-American, suffers from sickle-cell anemia, a lifelong chronic condition for which he takes pain medication. 1RP 121, 148; 2RP 221; CP 95.[1] While

[1] There are three volumes of verbatim reports of proceedings. The first volume ("1RP") contains proceedings from 10/3/13; 10/16/13; 8/1/14; 8/13/14;

at the hospital, Mr. Jordan felt that he was not being treated properly and that he needed his pain medication, which was not being provided. See CP 95-96; 2RP 205.

In pain, and suffering from withdrawal of his medicine, Mr. Jordan became upset and demanded his medications. See CP 95-96; 2RP 221. Mr. Jordan swore at the staff. CP 95. He made multiple statements that he would get a gun and kill everyone. CP 95. Mr. Jordan also spoke about recent shootings at the Naval Shipyard in Washington, D.C. and of a bus driver in downtown Seattle. CP 95. At some point, Mr. Jordan was restrained by hospital security. CP 95. Dr. Sachita Shah "witnessed" Mr. Jordan's behavior. CP 95. Dr. Shah did not state she feared that Mr. Jordan would actually go get a gun and shoot everyone. CP 95. Rather, she feared Mr. Jordan "could" do so. CP 95.

Mr. Jordan was arrested at the hospital by police officers. CP 96. He stated he was having a sickle-cell crisis. 1RP 121. Mr. Jordan denied that he had threatened anyone and said his statements had been hypothetical. 1RP 111, 123, 135. He said he had not intended to harm anyone. 1RP 121. When asked by the officer if he needed a wheelchair,

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8/21/14; 8/26/14; 8/27/14; and 10/2/14. The second volume ("2RP") contains proceedings from 10/24/14. The last volume ("3RP") contains proceedings from 10/17/13; 10/30/13; 11/4/13; 11/6/13; 12/6/13; 1/17/14; and 6/26/14.

Mr. Jordan said he did. 1RP 113, 122. After a ride in a patrol car, Mr. Jordan was taken into the jail in a wheelchair. 1RP 117.

The State charged Mr. Jordan with felony harassment. CP 1. On October 16, 2013, appearing before the Honorable Jim Rogers, Mr. Jordan waived his right to be represented by counsel. CP 7-8; Supp. CP __ (sub. no. 13); 1RP 15. In the following months, after various hearings before the Honorable Ronald Kessler, the State moved for a two-month continuance on December 11th because Dr. Shaw would be unavailable. 3RP 42-43, 47; Supp. CP __ (sub. no. 16, 18, 20, 24A, 38).[2] Mr. Jordan, who had been in jail since September, objected. 3RP 47. Judge Rogers, presiding again, proposed that Mr. Jordan be released, but that he report and participate in the CCAP Enhanced program.[3] 3RP 47. Mr. Jordan

[2] Both the minutes and the transcript incorrectly represent that the prosecuting attorney on some of these dates was Carlos Gonzales. 3RP. Mr. Gonzales was briefly Mr. Jordan's court appointed attorney before Mr. Jordan was permitted to represent himself. 1RP 7.

[3] CCAP stands for Community Center for Alternative Programs. As described by our Supreme Court:

> CCAP is 'a weekly itinerary ... of structured programs' administered at the Yesler Building in downtown Seattle. There are two different CCAP tracks: CCAP Enhanced and CCAP Basic. Offenders ordered into CCAP Enhanced report in person to the Yesler Building daily, while those ordered into CCAP Basic report only by phone.

State v. Medina, 180 Wn.2d 282, 285, 324 P.3d 682 (2014).

expressed opposition, but ultimately acquiesced because he wanted to be released. 3RP 48-54.

Mr. Jordan did not appear at the next court date on January 17, 2014. 3RP 55. The State represented that Mr. Jordan's whereabouts were unknown and that Mr. Jordan had not reported to CCAP. 3RP 55. The court issued a warrant for Mr. Jordan's arrest. 3RP 55.

Mr. Jordan, now in custody and without counsel, appeared in court on June 26, 2014 before Judge Rogers again. 3RP 56; Supp. CP __ (sub. 57). The State recounted that Mr. Jordan had been representing himself. 3RP 56. The State notified Mr. Jordan that it intended to charge him with bail jumping. 3RP 62-63. Trial was set for August 18, 2014. 3RP 56.

The next court hearing was held on August 1, 2014, this time before the Honorable Patrick Oishi. Supp. CP __ (sub. 60). Mr. Jordan was still waiting for discovery and told the court that it might be too late for him to defend himself as a result. 1RP 25-26. The State represented that Mr. Jordan was not on the jail's pro se list and that he would need to get on that list before he could view the discovery. 1RP 25. The State provided another waiver of counsel form and asked the court to review it with Mr. Jordan. 1RP 25.

Mr. Jordan stated he still wanted to represent himself, but at the same time expressed frustration with his lack of access to legal materials,

supplies, and discovery. 1RP 28-30. He stated that he did not think he could prepare a meaningful defense. 1RP 29-30. Rather than engage in a full colloquy with Mr. Jordan on whether he was waiving his right to counsel, the court ruled that Mr. Jordan would remain pro se. 1RP 30. While correctly recounting that Judge Rogers had previously engaged in a colloquy with Mr. Jordan (nearly a year before), Judge Oishi incorrectly recounted that Judge Kessler had also conducted a colloquy with Mr. Jordan at some point. 1RP 30. Immediately following this discussion, the court granted the State's motion to amend the information to add a count for bail jumping and Mr. Jordan was arraigned on this additional charge. 1RP 30-32.

After further hearings in August on various matters, including a CrR 3.5 hearing where a video of Mr. Jordan in custody was played, Mr. Jordan informed the State he wanted to make an Alford[4] guilty plea. 1RP 115-26, 156. That same day, August 27, 2014, Mr. Jordan entered his plea, which the court, the Honorable Monica Benton presiding, accepted. 1RP 159-80. Under the agreement, Mr. Jordan did not agree with the State's understanding of his offender score and reserved a challenge to it. 1RP 166-67.

[4] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

On October 2, 2014, on the court's own motion, Judge Benton appointed stand-by counsel for Mr. Jordan to assist him at the sentencing hearing and on the issue of his offender score. 1RP 183. At the sentencing hearing, the State calculated Mr. Jordan's offender score as a 10. 2RP 215. Mr. Jordan, whose experience with the criminal justice system was largely from the 1970s and 1980s, argued his score was a 6. 2RP 205; CP 164. The court ruled that the State had provided an accurate calculation of Mr. Jordan's criminal history and that it had no legal basis to reduce the score. 2RP 220.

Mr. Jordan explained to the court that much of his criminal history was over 20 years old and that he changed. 2RP 217-20. He recounted he had given his life to God, was married, had a child, and was a professional guitar player. 2RP 218. He pleaded that he would rather be dead than go back to prison. 2RP 219. In sentencing Mr. Jordan, Judge Benton expressed significant regret, explaining that the video the court observed at the CrR 3.5 hearing was profoundly moving, that the criminal penalties were unjust, and that if Mr. Jordan had been represented by counsel, the result may well have been different:

> The Court was profoundly moved by the videotape that the Court had an opportunity to see at the time of the crime was committed-just-just- after the crime was committed by way of the arrest tape. And, there were some very compelling concerns that you voiced in that police car.

> And, it showed a-a very troubled person addicted to drugs which were given to fight a lifelong disease of sickle cell anemia. And, it was jarring to think that there would be criminal penalties for someone who was clearly under the influence of withdrawal from medications which were intended to relieve pain.
>
> . . . . you're here facing a sentence of 51 months, which I am going to impose, concurrent as to Counts I and II. There is no upside to that for anyone. It's an [a]bject lesson for the Prosecutor in this case, for standby counsel, and even for the Court. What a difference it might have made had legal counsel been in this case in the beginning.
>
> You have stood tall, Mr. Jordan, to teach yourself in prison, to articulate your wishes in court. But, you have not attained a law degree, and that's what you needed in this scenario.

RP 220-22. The 51 month sentence was the lowest end of the standard range. 2RP 220. Mr. Jordan appeals.

E. ARGUMENT

1. Mr. Jordan was deprived of his right to counsel, requiring that his guilty plea be set aside.

a. A defendant's waiver of the right to counsel must be unequivocal and be made knowingly, intelligently, and voluntarily.

Criminal defendants have a constitutional right under the state and federal constitutions to counsel. Const. art. I, § 22; U.S. Const. amend. VI, XIV. Defendants may waive this right and represent themselves. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); City of Bellevue v. Acrey, 103 Wn.2d 203, 209, 691 P.2d 957

(1984). The waiver of the right to counsel must be affirmative and unequivocal. Acrey, 103 Wn.2d at 207. Like other constitutional rights, the waiver of counsel must be knowing, voluntary, and intelligent. Id. at 208-09.

An on the record colloquy is the preferred method. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). At the very least, the defendant must understand the seriousness of the charge or charges, the possible maximum penalty, and that technical procedural rules govern defenses. Id. Absent a sufficient colloquy, rarely will the record show awareness of the risks of representing oneself. Acrey, 103 Wn.2d at 211.

Mr. Jordan validly waived his right to counsel near the beginning of the case on October 16, 2013. This is the beginning, not the end of the analysis.

b. A significant change in circumstances requires a renewed, valid waiver of the right to counsel.

Ordinarily, a valid waiver of the right to assistance of counsel continues throughout the proceedings. State v. Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006) aff'd on other grounds, 164 Wn.2d 83, 186 P.3d 1062 (2008). If there is a substantial change in circumstances, however, a new waiver of the right to counsel is required. United States v. Fazzini, 871 F.2d 635, 643 (7th Cir. 1989); Schell v. United States, 423

F.2d 101, 103 (7th Cir. 1970); Modica, 136 Wn. App. at 445-446. "The essential inquiry is whether circumstances have sufficiently changed since the date of the *Faretta* inquiry that the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel." United States v. Hantzis, 625 F.3d 575, 581 (9th Cir. 2010). Circumstances which may constitute a substantial change in circumstances include: a significant lapse of time between hearings, new charges, a request from the defendant, a change in potential sentences, or other similar circumstances. United States v. Clark, 774 F.3d 1108, 1113 (7th Cir. 2014) (collecting cases); State v. Rhoads, 813 N.W.2d 880, 889 (Minn. 2012) (amended charge that doubled the maximum possible punishment constituted a significant change in circumstances).

Schell is illustrative. There, a 20-year-old defendant waived his right to counsel at arraignment, pleaded guilty, and was released until sentencing. Schell, 423 F.2d at 102. Because the defendant was incorrectly told the maximum was five years, rather than six, the trial court gave the defendant the opportunity withdraw his plea at sentencing, which was held about six months later. Id. The defendant did not change his mind. Id. On appeal, the United States Court of Appeals concluded that a substantial change in circumstances had occurred, making the waiver of counsel ineffective:

> Under all the circumstances— the youth and inexperience of Schell, the lapse of six months between the two hearings, the change in posture of the case due to the events in the interim and due to questions as to the validity of the March plea— the express waiver of counsel in March should not be deemed effective in September.

Id. at 103.

A new charge is another circumstance that may constitute a substantial change. In Rhoads, two months after the defendant waived his right to counsel, the State filed an additional charge, doubling the potential maximum punishment. Rhoads, 813 N.W.2d at 883. The defendant renewed his waiver at trial months later, but the court did not inquire into whether the defendant understood the level of punishment he faced. Id. at 883-84. The Supreme Court of Minnesota held that the amended charge was a change in circumstance requiring a renewal of the defendant's waiver. Id. at 888. Because the court had not informed the defendant of the maximum penalty he faced, the reviewing court held the renewed inquiry was inadequate to establish waiver. Id. at 889.

c. The six-month lapse in proceedings, combined with an additional felony charge and a request for counsel, constituted a substantial change in circumstances requiring a new waiver of counsel.

Three key changes in circumstances occurred in this case after Mr. Jordan's waiver of counsel in October 2013. First, there was a significant lapse in the proceedings. Second, the State added a new felony charge

after this lapse. Third, Mr. Jordan requested counsel after the filing of this charge. Because these facts constituted a substantial change in circumstances, this Court should hold that a renewal of Mr. Jordan's waiver of counsel was required.

Concerning the lapse in proceedings, the State successfully had the trial date continued for two months in December 2013. Mr. Jordan then did not appear for a court date on January 17, 2014. Mr. Jordan appeared next in the case in June 2014 after he was arrested and jailed. This effectively reset the case. 3RP 59-60. Additionally, because Mr. Jordan had been rebooked into jail, the jail did not consider him to be pro se and refused to provide him access to legal materials until new documentation of Mr. Jordan's pro se status was provided. CP 35 ("Pro se inmates that leave the King County Correctional Facility and are later rebooked need to inform us of their return and must ask to be put on the pro se list. It isn't automatic or assumed that someone is still pro se when they return."). Mr. Jordan was not provided access to legal materials and supplies until August 7, 2014. CP 35. As in Schnell, this significant lapse in the proceedings weighs against finding that Mr. Jordan's waiver of counsel in October 2013 continued when he appeared in the case again in June 2014.

Next, the State filed an additional charge of bail jumping on August 1, 2014. 1RP 31; CP 16. Neither the court, the prosecutor, nor the

charging document itself informed Mr. Jordan of the maximum penalty for this charge. 1RP 31; CP 16. Admittedly, the maximum penalty for this offense was five years, the same as felony harassment. RCW 9A.20.021(1)(c) (class C felonies have five year maximums); RCW 9A.75.170(3)(c) (bail jumping is a class C felony when underlying charge is a class B or class C felony); RCW 9A.46.020(2)(b)(ii) (felony harassment by threat to kill is a class C felony). Thus, unlike Rhoades, this additional charge did not double the maximum penalty faced by Mr. Jordan. Still, it exposed Mr. Jordon to the risk of two consecutive sentences, effectively doubling the potential penalty. RCW 9.94A.589(1)(a) (allowing sentences for current offenses to be served consecutively if exceptional sentence requirements are met); RCW 9.94.535 (setting out requirements necessary for court to impose an exceptional sentence). Moreover, the new charge created an additional challenge to Mr. Jordon in defending himself. Because the charges were based on different fact patterns and law, preparation by Mr. Jordan to defend himself against the harassment charge would not prepare him to defend against the bail jumping charge. Thus, the new charge is a circumstance weighing in favor of requiring a new waiver of counsel. See Clark, 774 F.3d 1108; Davis v. United States, 226 F.2d 834, 840 (8th Cir.

1955) (finding that new charges might constitute a substantial change in circumstances).

Finally, after his return to custody in June 2014, Mr. Jordan made statements indicating that he wanted assistance of counsel. On August 1, 2014, Mr. Jordan stated he only wanted to remain pro se if he was going to be provided access to legal materials. 1RP 28-30. He also represented that he did not think he was going to be able to provide a meaningful defense given his lack of access to legal materials. 1RP 29. After this hearing, Mr. Jordan moved for assignment of counsel, which was addressed on August 11th. 1RP 39. Mr. Jordan, however, withdrew his request because he did not think it would be feasible for him to have an attorney, explaining that an attorney would ask for a continuance, which he did not want. 1RP 39.

These facts distinguish this case from Modica, where this Court held no second colloquy was required after the filing of additional charges and that the defendant's request for reappointment of counsel after the empanelment of the jury was properly denied. Modica, 136 Wn. App. at 434, 443-46. In Modica, there was no lapse in the proceedings. There, the defendant waived his right to counsel in July 2005 and the trial occurred that month. Id. at 439-40. An amended charge of witness tampering was added shortly after the defendant waived his right to counsel. Id. at 440.

The defendant also moved for reappointment during his trial. Id. In contrast, here, there was a significant lapse in the proceedings, the additional charge of bail jumping was added long after Mr. Jordan had waived his right to counsel, and Mr. Jordan indicated he wanted assistance of counsel before his trial date in August. Thus, unlike Modica, there was a substantial change in circumstances requiring a new inquiry and valid waiver of counsel.

d. Because there was no second valid waiver of counsel, the convictions should be reversed.

The trial court, Judge Oishi presiding, made a cursory inquiry into whether Mr. Jordan wanted to continue to represent himself on August 1, 2014. This inquiry, unlike the first inquiry on October 16, 2013, was inadequate. Compare 1RP 12-15 with 1RP 28-30. Judge Oishi simply asked whether Mr. Jordan wanted to continue to represent himself. 1RP 28-30. In response, Mr. Jordan answered ambivalently, stating that he wanted to represent himself, but only if he had proper access to legal materials and supplies, and that at this point it might be impossible for him to effectively do so. 1RP 27-30. Judge Oishi then ruled that because Judges Roger and Kessler had conducted colloquies and allowed Mr. Jordan to proceed pro se, Judge Oishi would also do so. 1RP 30.

However, the only colloquy in the record is the one conducted by Judge Rogers on October 16, 2013. 1RP 12-15.

Additionally, this inquiry occurred before Mr. Jordan's arraignment on the amended bail jumping charge, which the court accepted immediately after its cursory inquiry. 1RP 31-32. At this arraignment, Mr. Jordan was not informed of the statutory maximum for this charge. 1RP 31-32; CP 16 (amended information). The inquiry was also conducted before Mr. Jordan indicated that he wanted assistance of counsel. 1RP 39-40.

Accordingly, there was not an unequivocal renewal of Mr. Jordan's waiver of counsel which was knowing, voluntary, and intelligent. See Rhoads, 813 N.W.2d at 889 (2012) (renewed waiver of counsel on day of trial was not knowing and intelligent). This Court should reverse. State v. Silva, 108 Wn. App. 536, 541-42, 31 P.3d 729 (2001) (deprivation of right to counsel is necessarily prejudicial).

2. Mr. Jordan's guilty pleas to felony harassment and bail jumping are invalid and should be reversed.

a. Constitutional due process requires that pleas of guilt be knowing, voluntary, and intelligent.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. State v. Codiga, 162 Wn.2d 912, 922, 175 P. 3d 1082 (2008). The criminal rules reflect this principle by requiring that the

trial court not accept a guilty plea unless it is satisfied that there is a factual basis for the plea. Id.; CrR 4.2(d).[5]

The voluntariness of plea is an issue that can be raised for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001). "Establishment of a sufficient factual basis of guilt is not an independent constitutional requirement, but an inadequate factual basis may affect the constitutional voluntariness of the plea because some information about the facts is necessary to the defendant's assessment of the law in relation to the facts." In re Pers. Restraint of Clements, 125 Wn. App. 634, 645, 106 P.3d 244 (2005).

Mr. Jordan made an Alford plea. In this type of plea, "the accused technically does not acknowledge guilt but concedes there is sufficient evidence to support a conviction." In re Pers. Restraint of Cross, 178 Wn.2d 519, 521, 309 P.3d 1186 (2013). Our Supreme Court approved of Alford pleas in State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976). Like regular guilty pleas, Alford pleas must comply with due process and

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[5] This court rule reads:

> The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d).

have a factual basis to be valid. Cross, 178 Wn.2d at 521. "A trial judge may not accept an *Alford* plea without an evidentiary basis and without concluding that the plea is knowing, voluntary, and intelligent." Id. at 526.

b. There was not a sufficient factual basis to support Mr. Jordan's plea to felony harassment.

Felony harassment by means of a death threat is spelled out in the following statutory language:

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person . . . [and]
>
> . . .
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .
>
> (2) A person who harasses another . . . is guilty of a class C felony if . . . (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened. . . .

RCW 9A.46.020.

The information on the harassment charge alleged that Mr. Jordan had threatened to kill multiple people and that these threats placed Dr. Shah in reasonable fear that the threat would be carried out:

> [Mr. Jordon], on or about September 19, 2013, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Dr. Sachita Shah, by threatening to kill Cynthia Ruiz-Seitzinger, Diane Fullerswitzer, Levena Barlow, Sachita Shah and Vincent Smith, and the words or conduct did place said person in reasonable fear that the threat would be carried out.

CP 1, 16, 93 (emphasis added).

Because this language was confusing, Mr. Jordan moved to dismiss the charge as being unconstitutionally vague. 1RP 84-85. While rejecting Mr. Jordan's motion, the court, on August 26, 2014, ordered the State to file a bill of particulars. 1RP 93-94. The State answered that it intended to prove the following:

> (1) That on or about September 19, 2013, the defendant knowingly threatened to kill Cynthia Ruiz-Seitzinger, Diane Fullerswitzer, Levena Barlow, Sachita Shah, or Vincent Smith immediately or in the future;
>
> (2) That the words or conduct of the defendant placed Sachita Shah in reasonable fear that the threat to kill would be carried out;
>
> (3) That the defendant acted without lawful authority; and
>
> (4) That the threat was made or received in the State of Washington.

CP 110. In other words, the State intended to prove Mr. Jordan specifically threatened to kill Dr. Shah, along with the four others, and that

Dr. Shah was placed in reasonable fear that Mr. Jordan would carry out the threat to kill.

Mr. Jordan's Alford plea recited that the court could examine the probable cause certification and prosecutor's supplemental summary to find a factual basis for his plea:

> I do not believe I committed these offenses. However, after fully & fairly considering all of the evidence I believe there is a substantial liklihood [sic] that I would be convicted at trial. Therefore, I am pleading guilty to take advantage of the State's offer. I agree that the Court can review the probable cause certification & prosecutor's supplemental summary to find a factual basis for this plea and for sentencing.

CP 91. The probable cause certification and prosecutor's supplemental summary were attached to the plea documents. The probable cause certification was the basis offered for the harassment charge while the supplemental summary was the basis offered for the bail jumping charge.

In relation to Dr. Shah, the probable cause statement contains only one brief paragraph. It recounts that Dr. Shah "witnessed" Mr. Jordan's behavior and that she feared he "could" carry out what he said:

> Doctor Sachita Shah also witnessed Mr. Jordan's threatening behavior. Dr. Shah felt threatened when Mr. Jordan stated, 'I'm going to get an AK47 and come back and kill all of you motherfuckers….just like the navy yard.' Doctor Shah stated she and her staff feared that Mr. Jordan could actually carry out his plan.

CP 95 (emphasis added). The rest of the report relates to Ms. Ruiz-Seitzinger, Ms. Barlow, Ms. Fullerswitzer, Mr. Smith, and a security officer. CP 95-96.[6]

As interpreted, the offense of felony harassment "requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out." State v. Mills, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005) (emphasis added); accord State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003) ("the victim must be placed in reasonable fear that a threat to *kill* will be carried out.") (second emphasis added). Here, the probable cause certification did not provide a factual basis to conclude that the Dr. Shah was "the person threatened" or that Dr. Shah was placed in reasonable that fear that Mr. Jordan "would" act on the threat.

Regarding whether Dr. Shah was "the person threatened," the report does not provide a factual basis to conclude that Mr. Jordan threatened her. The report does not indicate that Mr. Jordan was aware of Dr. Shah or had interacted with her before. CP 95-96. Rather, the report states that she "witnessed" Mr. Jordan's threatening behavior, not that she was a target of it. CP 95. "Witnessed," a verb, means "to see or know by reason of personal presence." Webster's Third International Dictionary

[6] A copy is attached in the appendix.

2627 (1993). In other words, Dr. Shah simply saw or heard Mr. Jordan's threat. This stands in contrast to the facts alleged regarding Nurses Ruiz-Seitzinger, Fullerswitzer, and Smith, which provides a factual basis to conclude that Mr. Jordan was aware of them, interacted with them, and spoke to them. CP 95. The report did not recount that these people merely "witnessed" Mr. Jordan's behavior, rather the report recounts they were the targets of it. CP 95. That Dr. Shah merely saw or heard Mr. Jordan's threatening behavior is inadequate. She had to be the target of coercion or intimidation. State v. Morales, 174 Wn. App. 370, 380, 298 P.3d 791 (2013) ("person threatened" means the target of coercion, intimidation, or humiliation).[7] Thus, the report does not provide a factual basis to conclude that the "kill all of you" statement was aimed at coercing or intimidating Dr. Shah.

Concerning the reasonable fear requirement, the language in the report only recounts that Dr. Shah feared that Mr. Jordan could carry out his threat to kill, not that she feared he would actually do so. The word "would" is the past form of "will" and used "to express plan or intention" or "futurity from a point of view in the past." Webster's Third International Dictionary 2637-2638 (1993). The word "could" is the past

[7] As explained by the Morales court, the statute "contemplates (A) a person to whom a threat is communicated, (B) an intended victim of bodily harm, and (C) a target of the perpetrator's harassment (the individual the perpetrator hopes to coerce, intimidate, or humiliate)." Morales, 174 Wn. App. at 377.

of "can," which means "to be able to do, make, or accomplish." Webster's Third International Dictionary 323 (1993). Thus, reasonable fear that a threat "could" be carried out is different from reasonable fear that a threat "will" or "would" be carried out. For example, given the doctrine of mutually assured destruction, a person might reasonably fear that Russia could use nuclear weapons against the United States, but still not fear that Russia would use nuclear weapons. Because the facts do not show that Dr. Shah reasonably feared that Mr. Jordan would carry out his threat, there is not a factual basis to support the plea.

Hence, the plea to harassment lacks a sufficient factual basis. It cannot be considered knowing, voluntary, and intelligent. State v. Berry, 129 Wn. App. 59, 68, 117 P.3d 1162 (2005). This Court should remand with instruction that Mr. Jordan be permitted to withdraw his plea. Id.

c. Washington's felony harassment statute violates the First Amendment and is unconstitutional.

Defendants may challenge the constitutional validity of a statute to which they pleaded guilty to. Menna v. New York, 423 U.S. 61, 62, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975); State v. Saylors, 70 Wn.2d 7, 9, 422 P.2d 477 (1966).

The offense of felony harassment, as construed by our Supreme Court, does not require proof that the speaker intended to communicate a

threat. State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). The court has also held that the First Amendment does not impose such a requirement. Id.; State v. Schaler, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). The court is incorrect. The United States Supreme Court has held this is a requirement. Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). The Ninth Circuit Court of Appeals has so recognized. United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005) (holding First Amendment requires subjective intent to carry out threat); United States v. Bagdasarian, 652 F.3d 1113, 1117 n.14 (9th Cir. 2011) (same). Accordingly, the statute is unconstitutional.

While this Court is bound by Washington Supreme Court precedent, it is bound foremost by the United States Constitution and United States Supreme Court precedent. Cooper v. Aaron, 358 U.S. 1, 18-19, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). Following the First Amendment to the United States Constitution and United States Supreme Court precedent, this Court should hold that the statute is unconstitutional.

d. The charging document alleging bail jumping was deficient because it did not allege that Mr. Jordan knew he was required to appear on January 17, 2014.

A defendant may challenge the sufficiency of the information on appeal even where the defendant pleaded guilty. Saylors, 70 Wn.2d at 9.

To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, § 22; U.S. Const. amend. VI. When hearing a challenge to the sufficiency of the information for the first time on appeal, the court liberally construes the document, and analyzes whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document?" Kjorsvik, 117 Wn.2d at 105. If the court does not find the missing element, prejudice is presumed and reversal is required. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000). If the element is found, the court analyzes whether the defendant was actually prejudiced by the inartful language. Kjorsvick, 117 Wn.2d at 106; McCarty, 140 Wn.2d at 425.

Mr. Jordan was charged with bail jumping. RCW 9A.76.170(1). The statutory language of this offense includes a knowledge element:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1) (emphasis added). As interpreted, this knowledge requirement means that the State must prove that the defendant knew he

was required to appear on the specific date for which he did not appear. State v. Cardwell, 155 Wn. App. 41, 47, 226 P.3d 243 (2010) ("In order to meet the knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of the required court dates."), remanded on other grounds, 172 Wn.2d 1003, 257 P.3d 1114 (2011); State v. Ball, 97 Wn. App. 534, 535-36, 987 P.2d 632 (1999) (State must prove that the defendant knew he was required to appear at the scheduled hearing).

Mr. Jordan did not appear in court on January 17, 2014, as he was supposed to. 3RP 55. This was the basis of the bail jumping charge. The information,[8] however, failed to allege that Mr. Jordan knew he was supposed to appear in court on January 17, 2014:

> That the defendant Leland Alfred Jordan in King County, Washington, on or about January 17, 2014, being charged with Felony Harassment, a Class C felony, and having been released by court order with knowledge of the requirement of a subsequent personal appearance before King County Superior Court, a court of the state of Washington, did fail to appear as required;
>
> Contrary to RCW 9A.76.170(1), (3)(c), and against the peace and dignity of the State of Washington.

[8] The first amended information listed the date of the offense as "on or about" September 19, 2013. CP 16; 1RP 31. The information that Mr. Jordan pleaded to changed this date to January 17, 2014. CP 93.

CP 93. The generic language, "having been released by court order with knowledge of the requirement of a subsequent personal appearance before King County Superior Court," does not say that Mr. Jordan was notified that he was required to appear on January 17, 2014. Fairly read, this language only told him that he had been released with knowledge of a later unspecified court date and that he failed to appear on January 17, 2014.

Thus, Mr. Jordan was not told that the State had to prove he knew he was required to appear on January 17, 2014. Rather, the information erroneously told Mr. Jordan the State only had to prove that he had knowledge of a requirement to appear at some unspecified point in the future. This was incorrect, as Cardwell illustrates. There, the defendant was charged for bail jumping after not appearing for his court date on December 14, 2005. This Court rejected the State's argument that it only had to prove that the defendant knew he had to appear "some time in the future," rather than the actual December 14, 2005 court hearing date:

> At trial, the State maintained that as long as Cardwell knew that he would have to appear at some time in the future, it did not have to prove that he knew about the December 14, 2005 court hearing date. We disagree. Not only does the record establish that at the time of his release Cardwell's obligation to appear was contingent on the State's filing criminal charges before December 7, 2005, a future event that might not occur, there is no evidence that he had been given notice of the required court date. In order to meet the

> knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of the required court dates.

Cardwell, 155 Wn. App. at 47.

Accordingly, Mr. Jordan was not adequately made aware of the essential elements of the offense of bail jumping. The plea to this charge is invalid.

The State may argue that Mr. Jordan's challenge to the information is precluded by State v. Majors, 94 Wn.2d 354, 355, 616 P.2d 1237 (1980), a case preceding Kjorsvik. Such an argument should be rejected. In Majors, the defendant was charged with first-degree murder. Majors, 94 Wn.2d at 355. As part of a plea bargain, the defendant entered a plea of guilty to a reduced charge and to an information alleging he was a habitual criminal. Id. On appeal, he sought to challenge the information because one of the alleged prior felony convictions occurred after the date of the murder, which was the crime he was sentenced to as an habitual criminal. Id. at 356. The Supreme Court held that because the defendant had validly bargained for the possibility of a less severe sentence, any technical defect in the information was waived. Id. at 357-58.

Majors represents an "exception to the exception." State v. De Rosia, 124 Wn. App. 138, 145, 100 P.3d 331 (2004). This Court has recognized that "*Majors* has been limited to its facts by the Supreme

Court." In re Pers. Restraint of Bratz, 101 Wn. App. 662, 670 n.5, 5 P.3d 759 (2000). "*Majors* has generally been limited to circumstances where the factual basis for the guilty plea, typically a non-*Alford* plea, supports more severe charges." De Rosia, 124 Wn. App. at 145-46.

Here, unlike in Majors, Mr. Jordan did not receive reduced charges or penalties in exchange for his guilty plea. While Mr. Jordan signed a plea agreement, it was not comparable to the one in Majors. Thus, because there was no real plea bargain benefit, Majors does not apply. See id. at 145 (holding that Majors did not apply because defendant who made Alford plea did not receive any real benefit comparable to the one in Majors). Mr. Jordan's challenge to the information is properly before this Court.

e. The remedy for any of these violations is reversal and remand for withdrawal of the entire plea.

"Where pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding, the pleas are indivisible from one another." In re Pers. Restraint of Bradley, 165 Wn.2d 934, 941-42, 205 P.3d 123 (2009) (internal quotation omitted). Here these requirements are met. CP 79-107. Thus, invalidation of either the harassment or bail jumping convictions requires that the entire plea be overturned.

F. CONCLUSION

Because a substantial change in circumstances occurred, the Court was required to obtain another valid waiver of counsel from Mr. Jordan. Mr. Jordan did not unequivocally renew a valid waiver of his right to counsel. His plea to felony harassment lacked a factual basis and the offense violates the First Amendment. The charging document for bail jumping was also defective. Accordingly, this Court should reverse Mr. Jordan's convictions.

DATED this 17th day of September, 2015.

Respectfully submitted,

s/ Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

Appendix

Seattle Police Department
Case Investigation Report

Case Investigation Report: 2013-341235

Certification for Determination of Probable Cause

That Timothy DeVore is a Detective with the Seattle Police Department and has reviewed the investigation conducted in Seattle Police Department Case number 2013-341235. There is probable cause to believe that **Leland Alfred Jordan** committed the crime of **Felony Harassment** within the City of Seattle, County of King, State of Washington. This belief is predicated on the following facts and circumstances:

On September 19, 2013 at about 1000 hours, Mr. Jordan was at Harborview Medical Center - located at 325 9th Avenue - for the purpose of receiving medical care.

At some point during the treatment, Nurse Cynthia Ruiz-Seitzinger explained to Mr. Jordan that she was going to need a blood sample from him. Mr. Jordan yelled obscenities at Nurse Ruiz-Seitzinger stating he was "sick of the establishment and being judged." Mr. Jordan threatened to strangle Nurse Ruiz-Seitzinger if she touched him. Jordan yelled obscenities and referenced the recent Seattle bus shooting and the Navy shipyard shooting - adding that he would "get a gun at a drug house and come back and there won't be a soul left standing." Mr. Jordan – an African American – also stated, "Those niggers got it right...bam, bam, bam." Nurse Ruiz-Seitzinger said Mr. Jordan made multiple statements similar to the ones described above.

ECG technician, Levena Barlow witnessed Mr. Jordan making the threats of violence toward the hospital staff members, including the threat to carry out a similar act of the Naval Shipyard shooting in Washington DC as well as the downtown Seattle shooting of the Metro bus driver. Barlow said Mr. Jordan was very specific on using an AK47 and "was justifying his actions with racism and (his) untreated medical condition." Barlow also stated that a pair of scissors and a cell phone were removed from Mr. Jordan's person at the point that he was restrained by Hospital security.

Nurse Diane Fullerswitzer said Mr. Jordan was very threatening and at one point, stated to her and the other staff, that if he did not get his pain medications he was going to "beat all" their asses. Mr. Jordan then told the nursing staff that he would come back and "shoot everybody" making reference to multiple recent shootings and added that "black men snap" apparently justifying the Naval shipyard shooting. Mr. Jordan added, "See, that is what happens if I don't get what I want."

Nurse Vincent Smith was also assisting in the care of Mr. Jordan and stated that Mr. Jordan yelled profanities and made violent threats toward him – including, "I'm going to beat your fucking ass" and "You saw the guy who shot up the bus downtown, you saw the guy who shot up the Navy shipyard...well I'm about to snap and I'm going to get a gun and come here and shoot everybody."

Doctor Sachita Shah also witnessed Mr. Jordan's threatening behavior. Dr. Shah felt threatened when Mr. Jordan stated, "I'm going to get an AK47 and come back and kill all of you motherfuckers....just like the navy yard." Doctor Shah stated she and her staff feared that Mr. Jordan could actually carry out his plan.

Harborview Medical Security Officer Brian Wetzsteon and additional back up officers were present and witnessed the described actions of Mr. Jordan while placing him in restraints. SO Wetzsteon heard Mr. Jordan refer to the attending nursing staff as "crackers" and "whites" while making the threats to return and "kill everybody." Other

than RN Smith - who is African American - the attending nursing staff for Mr. Jordan were all listed as "white" in the police report.

Mr. Jordan was ultimately treated for his medical issue then taken into custody by Seattle Patrol Officers David Moore and Thomas Lee.

Mr. Jordan was booked into the King County jail for Investigation of Harassment.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief. Signed and dated by me this 21st day of September 2013, at Seattle, Washington.

5487

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

STATE OF WASHINGTON, Respondent, v. LELAND JORDAN, Appellant.	)))))))))	NO. 72728-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] LELAND JORDAN 231085 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2015.

X_____

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