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SUPREME COURT NO. 92943-2
C.O.A. No. 47362-3-II
Cowlitz Co. Cause NO. 14-1-00414-9

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNY GEORGE MADARASH,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

I. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS DECISION

The Court of Appeals correctly decided this matter, holding that there was sufficient evidence supporting Madarash's harassment convictions for threatening three police officers. The respondent respectfully requests this Court deny review of the February 17, 2016, Court of Appeals' opinion in *State v. Kenny G. Madarash*, No. 47362-3-III, affirming Madarash's convictions.

III. STATEMENT OF THE CASE

On March 28, 2014, Officer James Kelly of the Longview Police Department attempted to arrest Timothy Bean on the 200 Block of 17th Avenue in Longview to assist the Department of Corrections ("DOC"). RP 6/11/2014 at 69-70.[1] While attempting to locate Mr. Bean, Officer Kelly made contact with Kenny Madarash. RP at 70. Officer Kelly was advised by DOC that Madarash was on DOC supervision out of Clark County and was not permitted in Cowlitz County without a trip permit.

[1] Because the vast majority of citation to the Verbatim Report of Proceedings occurred on June 11, 2014, citations to the record all refer to the transcription for this day of trial unless otherwise specified.

RP at 71. Madarash did not have a trip permit. RP at 71. DOC personnel responded to the location and took Madarash into custody. RP at 71.

About a week later, on April 4, 2014, Officer Kelly was on patrol, driving down Alabama Street in Longview at around 6:00 p.m., when he observed a person cross the street without using the crosswalk talking on his cell phone. RP at 72-73. Officer Kelly came closer and observed that the person crossing the street was Madarash. RP at 73. Madarash was wearing the same clothing as he had been when Kelly contacted him on March 28th. RP at 74. Officer Kelly contacted Madarash in the 300 Block of 17th Avenue and asked him for identification. RP at 75. Madarash responded by saying, "F*** you, I did nothing wrong." RP at 75.

Officer Kelly asked Madarash if he had a warrant for his arrest. RP at 75. Madarash then began walking away from Officer Kelly, northbound down the middle of 17th Avenue. RP at 75. Officer Kelly grabbed Madarash by the arm and advised him he was under arrest. RP at 76. Madarash pulled his arm away from Officer Kelly, told him he was leaving, and that he had no reason to contact him. RP at 76. Madarash continued to try to get away from Officer Kelly, so Officer Kelly grabbed him again by the arm and advised Madarash that he was under arrest. RP at 76. Madarash pulled his arm away from Officer Kelly again. RP at 76. Officer Kelly then pushed Madarash up against a vehicle, advised him he

was under arrest, and instructed him to place his hands behind his back. RP at 77. Madarash pushed up against the car then tried to pull away from Officer Kelly. RP at 77. Madarash then looked at Officer Kelly and stated, "F*** you, I am not going to jail." RP at 77. Madarash continued to attempt to get away from Officer Kelly and yelled at him. RP at 77.

While struggling with Madarash, Officer Kelly used his radio to advise other police officers that he needed assistance due to Madarash's resistance. RP at 77-78. Officer Kelly informed dispatch that Madarash was fighting with him and that he needed more units there "now." RP at 78. Madarash continued to try and get away from Officer Kelly. RP at 78. Using an arm-bar takedown, Officer Kelly managed to take Madarash to the ground. RP at 78. On the ground, Officer Kelly and Madarash continued to struggle. RP at 79. Madarash would not allow Officer Kelly to place his hands behind his back. RP at 79.

During the struggle on the ground, Madarash yelled at Officer Kelly, "You're a f***ing pig and I will kick your ass." RP at 79. At the time the threat was made, Officer Kelly did not have control over Madarash's hands. RP at 79. Officer Kelly did not know whether Madarash had a weapon in his pockets or not. RP at 79. Because Officer Kelly did not have control of Madarash's hands he was concerned and "felt he could have easily tried to have done something, grabbed

something, a weapon or anything like that." RP at 79. For these reasons, Officer Kelly feared that Madarash would actually follow through with the threat and feared for his own safety. RP at 79-80.

Eventually, Officer Kelly was able to place Madarash in handcuffs. RP at 80. Additional police arrived. RP at 81. Officer Tor[y] Shelton[2] and Officer Chris Angel of the Longview Police Department arrived to assist Officer Kelly. RP at 81. Officer Shelton and Officer Angel searched Madarash, then attempted to get him into Officer Kelly's patrol car. RP at 81. Madarash refused to enter the patrol car and told the officers he was not going to jail. RP at 81, 100. Officer Shelton took hold of Madarash's arm, and Officer Angel held the other arm. RP at 100-01. Madarash began pulling his arms away trying to get away from the officers. RP at 101, 118. The officers began to put Madarash inside the car. RP at 119. Madarash turned, looked at both Officers and angrily screamed, "I'm gonna f***ing kill you." RP at 81, 101, 119.

Officer Shelton feared Madarash would actually carry out the threat. RP at 101. Although Madarash was in custody at the time, Officer Shelton feared he would harm him at a later time. RP at 101. Officer Shelton's fears were based on the fact that he already knew Madarash had a probation violation, was unaware of the extent of his criminal record,

[2] The Verbatim Report of Proceedings incorrectly spells Officer Shelton's first name as "Tori".

and the fact that Longview is a small town making it easy for Madarash to find him. RP at 102. Officer Shelton was also concerned because the threat was accompanied by anger and rage and because Madarash had already demonstrated a willingness to wrestle and fight with Officer Kelly. RP at 102.

While Officer Angel was not afraid of what Madarash, who was now in handcuffs, would do at that moment, he was fearful of what Madarash would do in the future. RP at 119-120. Officer Angel believed Madarash to be serious about the threat because he made eye contact with him and was very direct and pointed in making the threat. RP at 120. Officer Angel was also aware Madarash had struggled with Officer Kelly and that he was obviously upset. RP at 120. Though Officer Angel did not know what would eventually happen, he feared that Madarash would attempt to carry out the threat sometime in the future when he saw him on the street. RP at 120.

Madrash was charged with felony harassment of a criminal justice participant for the threat against Officer Kelly and two counts of felony harassment by threat to kill for threatening Officer Shelton and Officer Angel. CP at 13-15. After trial, the jury found Madarash guilty of felony harassment of a criminal justice participant for threatening Officer Kelly. CP at 87. The jury also found Madarash guilty of two lesser included

counts of harassment by threat of bodily injury for threatening Officer Shelton and Officer Angel. CP at 84, 86.

IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION

Because Madarash's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Madarash maintains that even though the jury heard testimony that he had threatened harm to three police officers, there was insufficient evidence to support his harassment convictions. Madarash brings his petition under RAP 13.4(b)(3) and 13.4(b)(4). However, because there was sufficient evidence to support his convictions, his petition fails to raise a significant question of constitutional law and does not involve an issue of substantial public interest. For these reasons, his petition does not meet the criteria required for review under RAP 13.4(b).

A. BECAUSE THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND MADARASH GUILTY OF FELONY HARASSMENT OF A CRIMINAL JUSTICE PARTICIPANT, HIS PETITION DOES NOT RAISE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW OR INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

There was sufficient evidence for the jury to find Madarash guilty of felony harassment of a criminal justice participant. The Washington Supreme Court has stated:

> When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977); *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The jury heard evidence that prior to being secured, Madarash threatened Officer Kelly with bodily injury. Considered under all the circumstances, there was a sufficient evidence for the jury to find that this was a true threat to Officer Kelly supporting its verdict of felony harassment of a criminal justice participant.

When determining the sufficiency of evidence the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn.App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *Jones*, 63 Wn.App. at 707-08. "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

A statute may only proscribe a "true threat." *State v. Boyle*, 183 Wn.App. 1, 7, 335 P.3d 954 (2014). A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of another person." *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (citations omitted). A true threat does not require the speaker to actually intend to carry it out. *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (citing *Kilburn*, 151 Wn.2d at 46). "It is enough that a reasonable speaker would foresee that the threat would be considered serious." *Id.* "A true threat is a serious threat, not one said in jest, idle talk, or political argument." *Kilburn*, 151, Wn.d2d at 43.

RCW 9A.46.020 defines the crime of felony harassment of a criminal justice participant:

> (1) A person is guilty of harassment if (a) [w]ithout lawful authority, the person knowingly threatens (i) [t]o cause bodily injury immediately or in the future to the person threatened or to any other person...and (b) [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out[.] (2)(b) A person who harasses another is guilty of a class C felony if... (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made.

Thus, felony harassment of a criminal justice participant requires that a person knowingly threaten to cause bodily injury immediately or in the future to a criminal justice participant and that the criminal justice participant be placed in reasonable fear that the threat will be carried out.

The statute also speaks to the fear of the criminal justice participant who receives the threat:

> For purposes of (b)(iii)...the fear from the threat must be a fear that a reasonable criminal justice participant would have under all circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

RCW 9A.46.020 (2)(b). Thus, the criminal justice participant's fear of a threat must be considered under all the circumstances. "[T]hreatening words are not harassment if it is apparent to the criminal justice participant that (1) the speaker does not have the present ability to carry out the threat and (2) the speaker does not have the future ability to carry out the threat." *Boyle*, 183 Wn.App. at 11. As a logical consequence, "if it is apparent to the criminal justice participant that the speaker had either the present ability or future ability to carry out the threat, the statements would constitute harassment" as RCW 9A.46.020(1) defines harassment to include threats to cause bodily injury immediately or in the future. *Id.*

In *Boyle*, the defendant, Kane Boyle, argued there was insufficient evidence to support his conviction for felony harassment of a criminal justice participant. 183 Wn.App. at 4. Boyle was arrested for driving under the influence ("DUI"), handcuffed, and placed in the back of a Port Orchard police officer's patrol car. *Id.* at 5. While in the back of the patrol car, Boyle shouted profanities at the officer, kicked the door panel of the patrol car, and became extremely angry. *Id.* Boyle then made several equivocal threatening statements to the officer that included:

> 'People will look you and your family up and do them in. I would never threaten your family.' 'I would never attack children, but cops and child molesters are fair game.' 'People should shoot you guys in the face and I'll be glad when they do. I would not do it myself, but you know someone will.' 'Remember Forza Coffee, it was good stuff.' 'Forza Coffee, that's what should happen to all cops and their families.' 'You wait and see what happens when I get out. I'm not threatening you.' 'I hope your children die.' 'F**k your face, f***ing swine. Read my record. Read it twice.' 'Someone will kill you and your family. I'm not saying it's going to be me, but someone is going to snipe cops and their families.'

Id. The jury found Boyle guilty of felony harassment of a criminal justice participant. *Id.* at 6. On appeal, Boyle argued that there was insufficient evidence presented to prove: (1) a reasonable person in his position would have known his statements would be perceived as a threat, (2) a reasonable criminal justice participant in the officer's position would have

interpreted his statements as a threat, and (3) that it was apparent to the officer that he had the present and future ability to carry out any threat. *Id.*

The Court of Appeals stated: "The nature of the threat depends upon a totality of the circumstances, and a reviewing court does not limit its inquiry to a literal translation of the words spoken." *Id.* at 8 (citing *State v. Locke*, 175 Wn.App. 779, 790, 307 P.3d 771 (2013), *review denied*, 179 Wn.2d 1021 (2014)). The court explained that because of Boyle's reference to the murder of police officers two years earlier at the Forza coffeehouse, furious demeanor, violent kicking of the car door, yelling, referencing his criminal record, and repeated threats there was sufficient evidence presented for the jury to find his statements were a serious expression of intent to inflict bodily harm on the officer and that a reasonable speaker would have foreseen the officer would take them seriously. *Id.* at 9. The court also said that this evidence was sufficient to overcome his statements disclaiming the threats. *Id.* Finally, the court explained that the jury could reasonably have found the officer's fear that Boyle would carry out his threats upon his release was "a fear that a reasonable criminal justice participant would have under all the circumstances." *Id.* Thus, there was sufficient evidence to support his conviction for felony harassment of a criminal justice participant.

In a related discussion regarding jury instructions, the *Boyle* Court also analyzed the statute's language addressing the belief of the officer. It quoted the statute's language that "[t]hreatening words do not constitute harassment if it apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat. *Id.* at 11 (quoting RCW 9A.46.020(2)(b)). The *Boyle* Court agreed with the trial court that this sentence, which is phrased in the negative, was an exception to the crime rather than an element. *Id.* The court explained:

> [The statute] plainly states that threatening words are not harassment if it is apparent to the criminal justice participant that (1) the speaker does not have the present ability to carry out the threat and (2) the speaker does not have the future ability to carry out the threat. Conversely, if it is apparent that the speaker had either the present ability or the future ability to carry out the threat, the statements would constitute harassment. RCW 9A.46.020(1), which defines harassment to include threats to cause bodily injury 'immediately or in the future,' is consistent with this conclusion.

Id.

Here, as in *Boyle*, when taken in the light most favorable to the State, there was sufficient evidence for the jury to find Madarash guilty of felony harassment of a criminal justice participant for his threat to Officer Kelly. Madarash demonstrated a hostile demeanor toward Officer Kelly by yelling at him, repeatedly swearing at him, refusing to comply with Officer Kelly's attempts to detain him, and actively resisting when Officer

Kelly tried to arrest him. Then, while they were struggling with each other on the ground, Madarash directly threatened bodily injury to Officer Kelly by saying: "You're a f***ing pig and I will kick your ass." RP at 79. Officer Kelly's fear that the threat would be carried out was reasonable. At the time the threat was made, Officer Kelly was struggling to control Madarash, did not have control of his hands, and was unaware if Madarash had a weapon in his pocket—a concern that police must account for whenever they conduct an arrest. And, unlike in *Boyle* where the threat was based only on a possibility of a future harm, here Officer Kelly was also dealing with the immediate possibility that Madarash would follow through on his threat by assaulting him during their struggle. Further, because Officer Kelly was aware that Madarash continued to return to the area—in violation of probation—the jury also could have found that it was reasonable for Officer Kelly to fear Madarash would carry out this threat in the future. Thus, at the time it was readily apparent to Officer Kelly that Madarash had the present and future ability to carry out the threat. Because there was sufficient evidence for the jury to find Madarash guilty of felony harassment of a criminal justice participant, he fails to raise a significant question of constitutional law or an issue of substantial public interest.

B. BECAUSE THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND MADARASH GUILTY OF MISDEMEANOR HARASSMENT FOR THREATENING OFFICER SHELTON AND OFFICER ANGEL, HIS PETITION NEITHER RAISES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW NOR INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The facts and circumstances of Madarash's threat to harm the other officers as he was being placed in the patrol car provided sufficient evidence for the jury to find him guilty of harassment by threat of bodily injury for threatening Officer Shelton and Officer Angel. Of course, the standard for reviewing the sufficiency of the evidence remains as previously stated, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *Green*, 94 Wn.2d at 216. "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ... A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Unlike Madarash's conviction for felony harassment of a criminal justice participant, the convictions for threatening the other two police officers were not charged as threats against criminal justice participants. Additionally, the jury found him guilty of lesser included

offenses of threatening bodily injury rather than a threat to kill. For these reasons, the additional requirements for felony harassment of RCW 9A.46.020(2)(b) do not apply to analyzing the sufficiency of the evidence for both of Madarash's misdemeanor harassment convictions.[3]

"In reviewing the sufficiency of the evidence...'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.*'" *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005) (quoting *Green*, 94 Wn.2d at 221 (quoting *Jackson v. Virgina*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)) (emphasis in original). When evaluating the sufficiency of the evidence, circumstantial evidence is not to be considered less reliable than direct evidence. *Delmarter*, 94 Wn.2d at 638. "'Determinations of credibility are for the fact finder and are not reviewable on appeal.'" *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006) (quoting *Hughes*, 154 Wn.2d at 152). The reviewing court will "defer to the trier of fact on decisions resolving conflicting testimony and the credibility of witnesses." *State v. Monschke*, 133 Wn.App. 313, 333, 135 P.3d 966 (2006) (citing *State v. Thomas*, 150

[3] Thus, the "present and future ability" language of RCW 9A.46.020(2)(b) has no application to Madarash's misdemeanor convictions.

Wn.2d 821, 874-75, 83. P.3d 970 (2006)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

RCW 9A.46.020 (1) prohibits a person, without lawful authority, from threating to cause bodily injury immediately or in the future to another person, when the threat places the person threatened in reasonable fear the threat will be carried out. As previously explained, this requires a "true threat," meaning "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of another person." *Kilburn*, 151 Wn.2d at 43; *see supra* Part IV-A.

Here, it was reasonable for the jury to find that Madarash's threat to harm Officer Shelton and Officer Angel was a "serious expression of intention to inflict bodily harm[.]" *Id.* When the officers arrived it was in response to Officer Kelly's call that Madarash was fighting with him and he needed assistance "now." Further, although Madarash had been handcuffed, he refused to get into the patrol car without being forced by the officers. As he was being placed in the patrol car, Madarash turned, eyed both officers, and then stated: "I'm gonna f***ing kill you." RP at 101.

It was reasonable for both officers to fear that Madrash would carry out this threat. Officer Shelton feared that Madarash would carry out the threat at a later time. At the time, Officer Shelton was aware that Madarash had a criminal record, had violated probation, and that Madarash had demonstrated a willingness to wrestle and fight Officer Kelly. RP at 102. Along with the fact that Longview is a small community, where Officer Shelton could easily be found, and the reality that Madarash was unlikely to be incarcerated permanently, it was reasonable for Officer Shelton to fear that Madarash would attempt to carry out the threat against him in the future. RP at 102. Officer Angel also feared what Madarash would do if he saw him again on the street. RP at 120. Officer Angel was aware that Madarash was obviously upset and had struggled with Officer Kelly. RP at 120. Further, Madarash's direct manner of making eye contact and pointedly stating the threat caused Officer Angel to take the threat seriously. RP at 120. Considering the practical reality of violence to police, such as in the Forza Coffee shop, it was reasonable for both of these officers to take Madrash's threat seriously.

The jury evaluated the evidence, and while it did not find that beyond a reasonable doubt the threat was a true threat to kill, it did find that the threat amounted to a threat to cause bodily injury. Under the facts

and circumstances of this case, this was not an unreasonable conclusion to draw. Obviously, Madarash could have meant he was going to inflict bodily injury upon the officers when he used the term "kill," and the infliction of bodily injury is necessarily included in the term "kill." Because there was sufficient evidence to support his misdemeanor convictions for harassment by threat of bodily injury for his threat to Officer Shelton and Officer Angel, Madarash fails to raise a significant question of constitutional law or an issue of substantial public interest.

V. CONCLUSION

Because Madarash's petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 16th day of June, 2016.

Ryan P. Jurvakainen
Prosecuting Attorney
Cowlitz County, Washington

By _____
Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 16th, 2016.

Michelle Sasser
Michelle Sasser