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NO. 63447-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

OTIS WILLIAMS,

Appellant.

RECD
FEB 08 2010
King County Prosecutor
Appellate Unit

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

The Honorable Douglass North, Judge

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# REPLY BRIEF OF APPELLANT

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JONATHAN M. PALMER
DANA M. LIND
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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## A. ARGUMENTS IN REPLY

### 1. THE STATE'S INTERPRETATION PROVIDES NO CLEAR GUIDELINES FOR DISTINGUISHING BETWEEN CHARGES AND ALLOWS DISPARATE TREATMENT OF SIMILARLY SITUATED DEFENDANTS.

The state fails to articulate any clear standards a prosecutor might employ in determining exactly how many counts to bring in a case of multiple contacts or multiple statements to a single witness.

The statute, as it is written, does not adequately define the unit of prosecution as either each "instance" of communicating with a witness, or the entire course of attempting to influence the witness. Following the Supreme Court's approach in State v. Leyda, the statute reasonably prohibits A course of conduct directed against a single witness in a single proceeding. 157 Wn.2d 335, 345, 138 P.3d 610 (2006); See also, State v. Thomas, 151 Wn. App. 837, 847-48, 214 P.3d 215 (2009) (Van Deren, C.J., dissenting).

Absent any clear standards for determining how to charge a course of conduct directed at a single witness in a single proceeding, the state's interpretation creates a very real potential for vast disparity in treatment between two similarly situated defendants. Such a result undermines confidence in the

administration of justice, and places undue power in the hands of the prosecutor.

2. UNDER WILLIAMS' INTERPRETATION, THE STATUTORY SCHEME PROVIDES AMPLE DISINCENTIVES TO CONTINUE TAMPERING WITH A WITNESS.

The state incorrectly asserts Williams' interpretation of the witness tampering statute is "absurd," because it provides "no additional sanction" for continuing to tamper with a witness." Brief of Respondent (BOR) at 9-10, 14. However, even under Williams' interpretation, there are numerous disincentives to continue tampering with a witness.

First, repeated instances of tampering with a single witness support the trial court imposing a harsher sentence once the defendant is convicted. The trial court has discretion to impose a higher sentence within the sentencing range. RCW 9.94A.530(1) ("The court may impose any sentence within the range that it deems appropriate.") Second, the prosecutor can seek an exceptional sentence under the SRA, by submitting to the jury the question of whether "[t]he current offense involved multiple victims or multiple incidents per victim where a defendant commits multiple or repeated instances." RCW 9.94A.535(3)(i). Third, repeated

contact with a single witness could bring the defendant under the telephone harassment statute,[1] RCW 9.61.230, or the witness intimidation statute,[2] RCW 9A.72.110. The witness intimidation statute provides a broad definition of what constitutes a threat, including:

> To do any other act which is intended to harm substantially the person threatened or another with respect to his [. . .] personal relationships;

RCW 9A.04.110 (27)(j); RCW 9A.72.110 (3)(ii). Fourth, as in this case, the contact may constitute a violation no-contact order. See CP 17 (Amended Information, Counts 7 and 8). Fifth, the

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[1] RCW 9.61.230(1)(b), in particular, provides:

> (1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
>
> (b) [. . .] repeatedly [. . .], whether or not conversation ensues[.]

[2] RCW 9A.72.110 provides, in pertinent part:

> (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
>
> (a) Influence the testimony of that person;
>
> (b) Induce that person to elude legal process summoning him or her to testify; [or]
>
> (c) Induce that person to absent himself or herself from such proceedings[.]

defendant increases the risk of detection with each contact with the witness.

In summary, the state erroneously claims Williams' interpretation is unreasonable, because it does not provide a disincentive to continue tampering with a witness. Yet even under Williams' interpretation, there are many disincentives, both legal and practical, to such continuation.

3. UNDER THE RULE OF LENITY, AMBIGUITIES ARE CONSTRUED IN FAVOR OF THE DEFENDANT.

The state suggests the Legislature should have written the statute differently, if it intended not to allow multiple punishments for contacts with a single witness in a single proceeding. BOR at 8. This erroneously suggests the statute's lack of clarity should be construed in favor of the state.

The state suggests various formulations by which the Legislature could have more clearly indicated its intent to allow only one charge for communicating with a single witness in a single proceeding. BOR at 8-9. However, under Washington law, where the legislature has not defined the unit of prosecution with specificity, the Court should not interpret the statutory language as permitting multiple punishments:

> When choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005).

The state's reasoning improperly reverses the rule of lenity. Following the rule of lenity, the ambiguity in the witness tampering statute must be resolved in favor of Williams' more lenient reading.

4. THE STATE FAILS TO ADDRESS THE CRITICAL DISTINCTION BETWEEN WASHINGTON AND WISCONSIN LAW.

The state suggests that the only reasonable reading of the witness tampering statute is one that allows for the highest degree of deterrence. BOR at 9-11; see also State v. Hall, 147 Wn. App. 485, 489-90, 196 P.3d 151 (2008). The rule of lenity belies this reading, however.

The state offers no rationale for why Washington Courts should contravene the rule of lenity and follow the Wisconsin case interpreting that state's witness tampering statute. State v. Moore, 292 Wis.2d 101, 713 N.W.2d 131, 138 (2006) (applying presumption that legislature intends multiple punishments, allows multiple convictions for communication with a single witness).

Because the Moore court applied a presumption that does not exist under Washington law -- namely that the court will presume the Legislature intends multiple punishments, it does not apply the rule of lenity. Compare Moore, 713 N.W.2d at 137 ("We begin with the presumption that the legislature intended multiple punishments.") with Tvedt, 153 Wn.2d at 711 ("[I]t is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite."). This legal distinction is important, and it undermines the state's reliance on the Moore case, and suggests this Court in Hall court erred in adopting its reasoning.

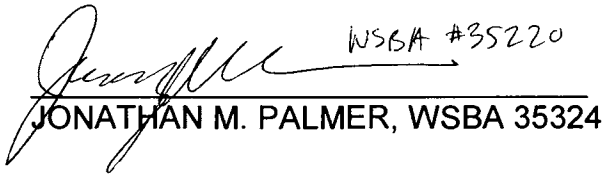
B. CONCLUSION

For the reasons stated herein and those stated in appellant's opening brief, this Court should reverse appellant's multiple convictions for witness tampering.

DATED this 8TH day of February, 2010.

Respectfully submitted,

NIELSEN BROMAN & KOCH, PLLC.



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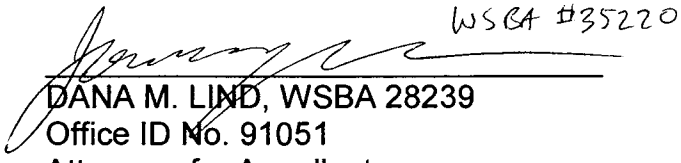
JONATHAN M. PALMER, WSBA 35324



WSBA #35220

DANA M. LIND, WSBA 28239
Office ID No. 91051
Attorneys for Appellant