

NO. 42496-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN CLARK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00042-5

BRIEF OF RESPONDENT

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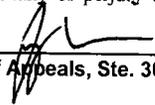
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 12, 2012, Port Orchard, WA 
Original electronically filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....7

 A. THE TRIAL COURT DID NOT ERR IN DECLINING TO USE THE DEFENSE’S PROPOSED “TRUE THREAT” INSTRUCTION BECAUSE UNDER WASHINGTON LAW A “TRUE THREAT” INSTRUCTION IS NOT NECESSARY WHEN THE CHARGE IS INTIMIDATION OF A WITNESS.7

 B. THE DEFENDANT HAS FAILED TO SHOW THAT *STATE V. KING* WAS WRONGLY DECIDED BECAUSE THE DECISION WAS BASED ON THE PLAIN LANGUAGE OF THE STATUTE AND IS CONSISTENT WITH DECISIONS FROM THE UNITED STATES SUPREME COURT AND NUMEROUS OTHER OPINIONS FROM AROUND THE COUNTRY.....9

IV. CONCLUSION.....17

TABLE OF AUTHORITIES
CASES

Chaplinsky v. New Hampshire,
315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).....10, 14

City of Seattle v. Huff,
111 Wash. 2d 923, 767 P.2d 572 (1989).....8

Gormley v. Director Conn.State Dept. of Probation,
632 F.2d 938 (2d Cir.).....13

Shackelford v. Shirley,
948 F.2d 935 (5th Cir.1991) 10-12

State v King,
135 Wn. App. 662, 145 P.3d 1224 (2006) 6-8

State v. Schaler,
169 Wash. 2d 274, 236 P.3d 858 (2010).....11

State v. Thompson,
701 P.2d 694 (Kan.1985)14

Thornhill v. Alabama,
310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).....8

U.S. v. DeAndino,
958 F.2d 146 (6th Cir., 1992)11, 13

US v. Lampley,
573 F.2d 783 (3d Cir.1978).....13

US v. Velasquez,
772 F.2d 1348 (7th Cir.1985)13, 14

Virginia v. Black,
538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).....11, 15

STATUTES

RCW 9A.72.11015, 16

RCW 9A.08.01014

RCW 9A.72.11015

18 U.S.C. § 1513(a)(2).....13

47 U.S.C. § 223.....13

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in declining to use the defense's proposed "true threat" instruction when under Washington Law a "true threat" instruction is not necessary when the charge is intimidation of a witness?

2. Whether the Defendant has failed to show that *State v. King* was wrongly decided when the decision was based on the plain language of the statute and is consistent with decisions from the United States Supreme Court and numerous other opinions from around the Country?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Stephen Clark, was charged by amended information filed in Kitsap County Superior Court with one count of intimidating a witness and one count of bail jump. CP 7-9. A jury found the Defendant guilty of the charged offenses and the trial court then imposed a standard range sentence. CP 70, 130-40. This appeal followed.

B. FACTS

On January 5, 2011, the Defendant was the passenger in a car that ran through a stop sign and collided with a house. After the collision the Defendant made threatening statements to a neighbor who had come outside and called the police as a result of the accident. Specifically, the evidence

showed that on the night in question the Defendant was initially at home drinking beer with another man. RP 77. The two men later went to a pizza restaurant where they had a pizza and drinks, and the Defendant became “pretty drunk” after having a “couple shots.” RP 78-79. The two men later left the restaurant in a car, with the other man driving and the Defendant riding in the passenger seat. RP 79. The car eventually came to a “T” intersection with a stop sign, where the road dead ends into Marion Drive. RP 15. Rather than stopping, the car went through the stop sign, through a fence, and collided with a residence (striking the front door of the residence). RP 16-17, 40.

A number of neighbors who lived in nearby residences heard the collision and came outside. RP 24, 40. The front end of the car was crumpled by the impact, and the driver’s door would not open. RP 17. The Defendant and the driver then got out of the car through the passenger side door. RP 17, 23. The driver then ran across the yard, fell into a ditch, and the got up and ran off leaving the neighborhood. RP 23-24, 81.

The Defendant, however, initially stayed at the scene and spoke to several of the neighbors. RP 18. The Defendant stated that he didn’t want to get into trouble and asked the neighbors to help him get the car out of the yard. RP 18, 42. None of the neighbors, however, expressed any interest in moving the car, since it had just struck someone’s house. RP 26, 42.

One of the neighbors that had come outside was Veronica Reczek. RP 38-39. Ms. Reczek had been in her home when she heard a car coming down the street revving its engine. RP 38-39. She then heard a loud bang which she described as “unforgettably loud.” RP 39. Ms. Reczek grabbed her phone, “bolted” out the door, and called 911 in order to summon the police and an ambulance. RP 40.

Ms. Reczek, (who was still on the phone with 911) came outside and tried to get the Defendant to stop and told him to lie down since he had just been in a car that hit a building and might have serious injuries. RP 40, 42-43. The Defendant, however, did not comply with Ms. Reczek’s requests. RP 40, 42-43. Instead, the Defendant asked Ms. Reczek if she was on the phone with the police. RP 43. Ms. Reczek told him that she was talking to the police. RP 43. The Defendant then said to Ms. Reczek that, “Snitches get stitches, bitch.” RP 43.¹

The Defendant was about two to three feet from Ms. Reczek when he made this statement. RP 48. Although the defendant did not raise a fist at Ms. Reczek when he made this statement, Ms. Reczek did explain that the Defendant was “leaning forward, emphasizing.” RP 48. Ms. Reczek could

¹ Another witness describe the actual statement as “Snitches are bitches, snitches get stitches.” RP 19, 27.

smell alcohol on the Defendant's breath. RP 48-49.²

Ms. Reczek took the Defendant's words as a threat and understood that he was conveying to her that she would be hurt if she continued to talk to the police. RP 50. Ms. Reczek further testified that "I don't take threats lightly. It makes me very nervous." RP 50.

No actual physical confrontation occurred, and eventually the Defendant (who appeared frustrated by the neighbors would not help him move the car) left the scene. RP 26.

An aid car and law enforcement later arrived at the scene. RP 31. Deputy Victor Cleere of the Kitsap County Sheriff's Office was one of the officers that arrived, and as he approached the scene he saw the Defendant walking down Lake Way. RP 31. After a brief investigation at the scene, Deputy Cleere went back and arrested the Defendant after witnesses had identified him. RP 32-33.³

² At trial the Defendant acknowledged that he was nervous that the police would come to the scene and think that he had been driving the car since the driver had left the area. RP 81-82, 91. The Defendant did not deny making the statement to Ms. Reczek; rather, he testified that he was drunk and had spotty memory of the events at issue. RP 82-83. He further explained that "I said something retarded, when I was drunk." RP 83.

³ As outlined previously the Defendant was convicted of the charge of intimidating a witness and bail jumping. The Defendant has not raised any issues on appeal regarding the bail jumping count, thus the facts relating to that charge have not been summarized. The portions of the transcript relevant to that charge, however, can be found at RP 55-75.

At the conclusion of the trial testimony the parties discussed jury instructions. RP 98. With respect to the charge of intimidating a witness, the State submitted proposed instructions that mirrored the statute and stated that in order to find the defendant guilty of the crime of intimidating a witness the jury must find that the State had proved, among other things:

That on or about January 5th, 2001, the defendant by use of a threat against a current or prospective witness attempted to induce that person not to report the information relevant to a criminal investigation.

CP 27. The State's proposed instructions also included an instruction defining the word "threat" which read as follows;

As used in these instructions, threat means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time. Threat also means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

CP 28.

The Defendant proposed an instruction that contained this same definition but that also included the following language regarding "true threats:"

To be a threat, a statement or act must occur in a context or under such circumstance where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 44.

At the hearing regarding the instructions the State argued in favor of its proposed instruction and cited *State v. King*⁴ which held that a “true threat” instruction is not appropriate when the charge is intimidating a witness. RP 102-04. The defense acknowledged that *King* was on point and supported the State’s position. RP 99. The defense, however, cited an unpublished opinion and asked the court to include the “true threat” language. RP 101-02.⁵

The trial court then gave its ruling on the instructional issue as follows:

The *King* case very clearly holds that when it comes to the statute that we’re working with, in this case, intimidating a witness, that the true threat analysis does not need to be part of the definition of a threat that’s submitted to the jury. And in that sense, *King* is on point.

RP 106. The trial court concluded that “*King* is the operative language, and I will use the State’s instruction.” RP 108.⁶ The Court’s instructions to the jury at trial used the language from the State’s proposed instruction. CP 58.

⁴ *State v King*, 135 Wn.App. 662, 145 P.3d 1224 (2006)

⁵ The State objected to the defense’s citation to an unpublished opinion. RP 102-03.

⁶ The trial court also went on to address the defense’s citation to an unpublished case and stated that,

“I think the law is very clear that the Court should not and must not consider the analysis in any way, shape or form from the [unpublished] decision in arriving at a decision with respect to how to properly define the term “threat” in the intimidating a witness statute to this jury.”

RP 106-07

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DECLINING TO USE THE DEFENSE'S PROPOSED "TRUE THREAT" INSTRUCTION BECAUSE UNDER WASHINGTON LAW A "TRUE THREAT" INSTRUCTION IS NOT NECESSARY WHEN THE CHARGE IS INTIMIDATION OF A WITNESS.

The Defendant argues that the trial court erred in failing to include the defense's proposed "true threat" language in the court's instructions to the jury. App.'s Br. at 4. This claim is without merit because the Washington Court of Appeals has specifically held a "true threat" instruction is not required when the charged offense is intimidation of a witness.

The Court of Appeals has previously rejected the argument raised by the Defendant in the present case. In *State v King*, 135 Wn.App. 662, 145 P.3d 1224 (2006) the defendant was charged with intimidation of a witness. On appeal, the defendant argued that the trial court erred by failing to give a "true threat" instruction. *King*, 135 Wn.App. at 668. In support of his claim, the defendant cited to felony harassment cases in which the courts had held that a true threat instruction was required. *King*, 135 Wn.App. at 668, citing *State v. Kilburn*, 151 Wn.2d 36, 41 84 P.3d 1215 (2004).

The Court of Appeals began its analysis by noting that a criminal statute that "prohibits a substantial amount of constitutionally protected free

speech violates the First Amendment and is facially overbroad.” *King*, 135 Wn.App. at 669, *citing City of Seattle v. Abercrombie*, 85 Wn.App. 393, 397, 945 P.2d 1132 (1997); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Thus innocent blather and jokes about harming people are protected speech, but true threats are not. *King*, 135 Wn.App. at 669, *citing Kilburn*, 151 Wn.2d at 41.

The Court then discussed the felony harassment cases relied upon by the defendant and found that those cases were distinguishable, noting:

But the crime of felony harassment and the crime of witness intimidation are different. The statute prohibiting harassment covers a virtually limitless range of utterances and contexts, any of which might be protected. Both the speech and context of witness intimidation, by contrast, are limited by the language of the statute. The statute requires the State to prove that the defendant communicated an intent to harm a person who has appeared, presumably against him, in a legal proceeding. A statute is overbroad only if it prohibits constitutionally protected conduct to a substantial degree. *City of Seattle v. Huff*, 111 Wash.2d 923, 926, 767 P.2d 572 (1989). There is, then, no constitutionally protected speech prohibited by a statute that outlaws solely threats to witnesses.

King, 135 Wn.App. at 669-70. The Court thus concluded that “the narrow scope of the speech prohibited here eliminates the First Amendment concerns inherent in the broader harassment statute. The jury was properly instructed.” *King*, 135 Wn.App. at 671-72.

Given the clear holding of *King*, the Defendant in the present case has failed to show that the trial court erred in failing to give a “true threat” instruction. Rather, as *King* clearly holds, such an instruction was unnecessary in the present case since the “narrow scope” of the speech prohibited by the witness intimidation statute raises no First Amendment concerns.

B. THE DEFENDANT HAS FAILED TO SHOW THAT *STATE V. KING* WAS WRONGLY DECIDED BECAUSE THE DECISION WAS BASED ON THE PLAIN LANGUAGE OF THE STATUTE AND IS CONSISTENT WITH DECISIONS FROM THE UNITED STATES SUPREME COURT AND NUMEROUS OTHER OPINIONS FROM AROUND THE COUNTRY.

The Defendant next claims that the *King* case should not be followed because it was “wrongly decided.” App.’s Br. at 8. This claim is without merit because the *King* decision was squarely based on the statute and is consistent with other numerous opinions.

The central holding of the *King* case is that the defendant’s proposed “true threat” instruction was not needed in a witness intimidation case because no constitutionally protected speech is prohibited by the statute since the statute only applies to a narrow spectrum of speech made in the limited context where a defendant has communicated an intent to harm a witness.

While most speech is protected from government regulation by the First Amendment to the United States Constitution, there are “certain well-defined and narrowly limited classes of speech” that are not protected because they are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth” that whatever meager benefit that may be derived from them is “clearly outweighed” by the dangers they pose. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir.1991).

While the United States Supreme Court has held that statutes that prohibit threats may only be directed at “true threats,” numerous opinions demonstrate that there are at least two ways to show that a threat is a “true threat,” and the proper method to be used in any particular case depends on the language of the statute at issue.

The first method of showing a “true threat” is by using an objective test that asks whether a reasonable person would view the statement as a serious expression of an intent to harm. This test is used in cases where the statute (such as the Washington harassment statute) does not contain a specific intent requirement in regard to the threat element of the offense. In addition, this test is often referred to as a sort of “negligence” test, as it essentially criminalizes a statement if a reasonable person would have understood that the statement would be taken as a serious threat, regardless of

the speaker's actual intent. *See, e.g., State v. Schaler*, 169 Wash.2d 274, 287, 236 P.3d 858 (2010)(explaining that the objective "true threat" test is simply a "negligence" test).

The second method of showing a "true threat" is by using a subjective test that asks whether the defendant actually meant or intended for his statement to be taken as a threat. The United States Supreme Court has specifically used this test in an intimidation case and has held that,

"True threats" encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.

...

Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death.

Virginia v. Black, 538 U.S. 343, 356-60, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)(emphasis added).

Numerous courts have further explained that if the statute in question contains a specific intent requirement, the question of whether or not the alleged threat is a "true threat" would be determined by a subjective standard, i.e., did the particular defendant subjectively intend the statement to be a threat. *See, e.g., U.S. v. DeAndino*, 958 F.2d 146 (6th Cir., 1992).

In *Shackelford v. Shirley*, 948 F.2d 935, (5th Cir,1991), for instance, the Fifth Circuit examined the Mississippi telephone harassment statute which made it a crime to make a telephone call “with intent to terrify, intimidate, or harass, and threaten to inflict injury or physical harm to any person.” *Shackelford*, 948 F.2d at 937. At trial, the judge instructed the jury that they should convict only if they found that Shackelford “ma[d]e a telephone call to [the victim] with the intent to terrify, intimidate or harass, and threaten[ed] to inflict injury and physical harm to the [victim] ...” *Shackelford*, 948 F.2d at 940. The Fifth Circuit ultimately concluded that,

[W]e are confident that the statutory language clearly prescribes for punishment only a class of “true threats,” and not social or political advocacy. Because the trial judge's instructions in this case tracked the language of the statute, the jury's verdict represents a finding that Shackelford engaged in unprotected, threatening speech.

Shackelford, 948 F.2d at 939-40. The court thus concluded that “threats made with specific intent to injure and focused on a particular individual easily fall into that category of speech deserving of no first amendment protection.” *Shackelford v. Shirley*, 948 F.2d at 937.

Similarly, in *DeAndino* the Sixth Circuit specifically addressed the different tests used depending on the language of the relevant statute, and stated that;

If the statute at issue in the present case has a heightened mens rea requirement of specific intent in regard to the threat

element of the offense, the question of whether or not the alleged threat is a “true threat” would be determined by probing DeAndino's subjective purpose in making the statement.

DeAndino, 958 F.2d at 148. The Sixth Circuit also stated that

If the statute contains a general intent requirement in regard to the threat element of the offense, the standard used to determine whether or not the communication contained an actual threat is an objective standard, i.e., would a reasonable person consider the statement to be a threat. If the statute contains a specific intent requirement, the standard is a subjective standard, i.e., did the particular defendant have the subjective knowledge that his statement constituted a threat to injure and did he subjectively intend the statement to be a threat.

DeAndino, 958 F.2d at 148.

Similarly in *US v. Velasquez*, 772 F.2d 1348 (7th Cir.1985), *cert. denied*, 475 U.S. 1021, 106 S.Ct. 1211, 89 L.Ed.2d 323 (1986), the court, in examining the first amendment implications of the federal statute criminalizing threats to retaliate against government informants, 18 U.S.C. § 1513(a)(2), held that the required “intent to retaliate” limits the kind of threats that may be punished and eliminates the possibility that threats containing ideas or advocacy would be punished. *Id.* at 1357. Likewise, the court in *US v. Lampley*, 573 F.2d 783 (3d Cir.1978), in upholding the federal telephone harassment statute, 47 U.S.C. § 223, against constitutional attack, noted that the statute's “narrow intent requirement precludes the proscription of mere communication.” *Id.* at 787; *see also Gormley v. Director*,

Connecticut State Dep't of Probation, 632 F.2d 938, 943 (2d Cir.), *cert. denied*, 449 U.S. 1023, 101 S.Ct. 591, 66 L.Ed.2d 485 (1980) (rejecting first amendment challenge to Connecticut telephone harassment statute in habeas corpus appeal); *State v. Thompson*, 701 P.2d 694, 697-98 (Kan.1985) (intent requirement narrows reach of telephone harassment statute to unprotected speech).⁷

As opposed to the “negligence” standard used in the first test (which uses an objective test examining whether a reasonable person would view the statement as a threat), the second test essentially used an “intentional” test; that is, did the speaker actually mean or intend that the statement be taken as an actual threat. As is well understood in criminal law, an intentional act is a higher standard than a negligence standard. *See, e.g.*, RCW 9A.08.010

⁷ The Courts have also explained that statements that are meant to be taken as threats are clearly not covered by the First Amendment. Long ago the United States Supreme Court explained that the First Amendment does not protect speech that is of “no essential part of any exposition of ideas,” and which, by its “very utterance inflicts injury or tends to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). More recently, the courts have explained that threats against witnesses are not covered by the First Amendment because such threats play no role in the true “marketplace of ideas,”

The statute punishes the making of a threat to do bodily harm to or destroy or damage the property of the informant as punishment (retaliation) for his informing. Such a prohibition is not vague or overbroad. Government cannot be effective if it cannot punish people who intimidate witnesses or informants by threatening to hurt them or damage their property, and no form of words would be significantly clearer than that employed in this statute. The First Amendment is remotely if at all involved. A threat to break a person's knees or pulverize his automobile as punishment for his having given information to the government is a statement of intention rather than an idea or opinion and is not part of the marketplace of ideas.

Velasquez, 772 F.2d at 1357.

(“When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally”). Thus in threat cases, a requirement that the State demonstrate that the defendant actually meant for the statement to be taken as a real threat requires more than the negligence test and is sufficient to demonstrate that the case involves a “true threat.”

In the present case the witness intimidation statute requires the State to prove that the Defendant made a threat in an *actual attempt* to induce the witness to not provide information relevant to a criminal investigation to law enforcement. RCW 9A.72.110. Thus, the State is required to show that the Defendant actually and subjectively meant for his statement to be a threat, since the statute requires the threat be made in an *actual attempt to induce the witness*. The requirement of an actual and subjective attempt to induce the witness is sufficient to show a “true threat.” *Virginia v. Black*, 538 U.S. at 356-60 (“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals).

While it would be constitutionally sufficient for a statute or jury instructions to require only a “negligence” standard or an objective test, the actual language of the statute at issue here requires an *actual attempt* to induce the witness by means of a threat. As the trial court’s instructions in

the present case required the jury to find more than mere negligence and required that the jury find that the Defendant made a threat in an actual attempt to induce the witness, the instructions were sufficient to demonstrate a “true threat” and no further instruction was required.⁸

Furthermore, the above analysis also demonstrates that any failure to give an objective “true threat” instruction, even if one was required, was harmless error. This is so because by requiring the State to prove more than mere negligence, the court’s instructions actually worked to hold the State to a higher burden than would have applied under the objective “true threat” instruction.

For all of the above stated reasons, the trial court did not err in refusing to give the objective “true threat” instruction in the present case.

⁸ The Defendant also argues that *King* was wrongly decided and specifically claims that, “What the *King* court failed to consider, however, was that even statements regarding an intent to harm a witness can be made in jest or amount to mere idle talk or hyperbole.” App.’s Br. at 8. This argument, however, is without merit as the elements of the offense show that statements made in jest and the like are not covered by the witness intimidation statute. The language of the statute requires the State to prove that the made a threat against a current or prospective witness and thereby “attempted to induce that person not to report the information relevant to a criminal investigation.” CP 58, RCW 9A.72.110. The State, therefore, must already prove that the Defendant’s comments were not merely a joke or some idle comment. Rather, the State must prove that the defendant made the comments at issue in an attempt to induce the person not to report information about a crime. While it is true that “statements regarding an intent to harm a witness can be made in jest or amount to mere idle talk or hyperbole,” that argument misses the point. The statute doesn’t require that the statement be made merely *about* harming a witness (which could be made in jest, etc); rather, the statute requires the State to prove that the statement was made in an *actual attempt* to induce the witness to withhold information. By requiring the State to prove that the Defendant made an actual and real attempt to intimidate a witness, the plain language of the statute itself eliminates any danger that constitutionally protected speech (such as innocent jokes or idle talk) is prohibited by the statute.

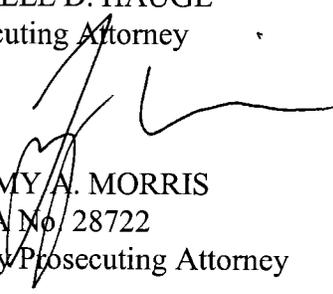
IV. CONCLUSION

For the foregoing reasons, Clark's conviction and sentence should be affirmed.

DATED June 12, 2012.

Respectfully submitted,

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