

62461-0

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No. 62461-0-I

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

STATE OF WASHINGTON, Respondent,

v.

MARLOW T. EGGUM, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred in reaching the merits of defendant's CrR 7.8 motion without having made the preliminary determination required by CrR 7.8 and whether this Court should treat the motion as a personal restraint petition.
2. Where defendant's guilty plea to felony harassment was part of a plea agreement to plead guilty to two counts of stalking and an agreed exceptional sentence and is indivisible therefrom, whether the defendant can separately challenge the felony harassment conviction.
3. Whether defendant can assert in a collateral attack that his threat should not have been construed as a threat to kill where he pleaded guilty to felony harassment and whether a threat that the victim was playing her last hand where defendant had previously threatened to kill the victim provided an adequate factual basis for felony harassment.
4. Whether the defendant's CrR 7.8 motion should be summarily dismissed as a successive petition where defendant failed to make any good cause showing as to why he did not assert this claim in his prior CrR 7.8 motion.

C. FACTS

Appellant Marlow Eggum was initially charged by information with two counts of felony stalking on July 20, 2005. CP 197-98. After a couple of amended informations, Eggum was charged on Jan. 22, 2007, with four counts of felony stalking regarding four different victims, six

counts of felony harassment regarding two victims, Janice Gray and Jerry Hemple, and four counts of violating a no contact order regarding Janice Gray and one count of non-felony harassment regarding Jerry Hemple. CP 156-61, 172-77, 187-90. The State provided notice of its intent to seek an exceptional sentence in the First Amended Information on January 17, 2006. CP 187-90.

As part of a plea agreement, the prosecutor filed a fourth amended information on January 24, 2007 charging two counts of felony stalking, regarding Janice Gray and Jerry Hemple, and one count of felony harassment regarding Janice Gray. CP 153-55. On that same day, Eggum signed a plea statement pleading guilty to the two counts of stalking and one count of felony harassment as charged in the Fourth Amended Information. CP 145-52. In that statement, Eggum stated:

I have entered into a plea agreement with the State. In exchange for my pleading guilty as stated herein, the state makes the following recommendation to the judge: The defendant shall serve 72 months with credit for time served since June 3, 2005 for COUNT: I, (sic) 72 months with credit for time served starting 6/3/2005 for COUNT: II, (sic) 72 Months with credit for time served starting on 6/3/2005, for COUNT: III, confinement in the custody of the Dept. of Corrections, ... To clarify time to serve: the defendant shall receive an exceptional sentence on all three counts up to 24 months on each. Each of the three counts shall run consecutively to a total of 72 months. The defendant shall receive credit for time served with his incarceration

beginning on 6/3/2005. The estimated number of days is 601 days. This time reflects an exceptional sentence above. ...

CP 148. In the statement Eggum also indicated that he understood that the judge could impose an exceptional sentence above the standard range if he and the State stipulated that justice was best served by imposition of an exceptional sentence and/or if the State provided him with notice of aggravating factors in support of an exceptional sentence and the judge found such factors based on stipulated facts, among other bases. CP 149. The agreement included credit for a significant amount of time he had served on DOC violations. 1/24/07 RP 8, 11.

At the time of the plea and sentencing hearing, the prosecutor explained that the recommendation for 72 months was based on running three sentences of 24 months each, consecutively to one another. 1/24/07 RP 6. The prosecutor and defense counsel both stated that the exceptional sentence was agreed and part of the plea bargain. 1/24/07 RP 7, 9-10. The judge imposed the agreed upon exceptional sentence of 24 months on each count, to run consecutively.¹ CP 130-44.

¹ The judgment and sentence was subsequently amended on Aug. 15, 2007 to state 72 months on each count, but then was amended back to the original 24 months on each count to run consecutively on Sept. 20, 2007. CP 129, Supp CP ____, Sub. Nom. 101.

Eggum subsequently moved to withdraw his plea as to Count II, moved for dismissal of Count II and moved for review of his exceptional sentence. Supp. CP ___, Sub. Nom. 92. His appeal of the court's denial of that motion was denied under Court of Appeals No. 60667-1-I, based on the indivisibility of his plea. See Court of Appeals No. 60667-1-I. The same day he filed his motion to withdraw Ct. II, he also filed a motion to modify his sentence regarding the no contact orders and domestic violence evaluations imposed as conditions of his sentence. Supp. CP ___, Sub. Nom. 93. On January 8, 2008 Eggum apparently filed a personal restraint petition regarding this cause number.² See COA No. 61180-1-I. Eggum filed the current 7.8 motion on July 3, 2008, although the court determined that he originally filed the motion in December of 2007. 7/29/08 RP 9.

D. ARGUMENT

- 1. Under State v. Smith, the trial court did not have jurisdiction to deny the CrR 7.8 motion; in the interest of judicial economy this Court should treat and decide the motion as a personal restraint petition.**

State v. Smith held that under the 2007 revision to CrR 7.8 a trial court has no jurisdiction to address the merits of such a motion unless it

² The State has not been made a party to that petition and it appears that petition is stayed pending the mandate in this case as well as two others.

has determined that the motion is not untimely and that either the defendant has made a substantial showing for the requested relief or that an evidentiary hearing is required. State v. Smith, 144 Wn.App. 860, 863, 184 P.3d 666 (2008) (emphasis added). The judge here held a hearing on the CrR 7.8 motion without first determining whether the motion was untimely and then, after deciding that it was not, without determining whether the motion required a show cause hearing. Therefore, under Smith, the judge had no authority to address the merits of the motion unless and until he determined that the defendant had made a substantial showing to support his motion or that an evidentiary hearing was required to resolve the motion. Having made neither determination, the court abused its discretion in addressing the merits of the case.

CrR 7.8 motion rulings are reviewed for abuse of discretion. State v. Forest, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005). As amended in 2007, CrR 7.8 now provides that unless a trial court determines a defendant has made a substantial showing that he is entitled to relief, or that an evidentiary hearing is required, the trial court is required to transfer a timely filed motion to the court of appeals for consideration as a personal restraint petition. CrR 7.8; Smith, 146 Wn. App. at 863. In relevant part, CrR 7.8 specifies:

(2). *Transfer to the Court of Appeals.* The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3). *Order to show cause.* If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8(c)(2), (c)(3). Interpreting the revised language, the court in Smith held: “The superior court may only rule on the merits of the motion when the motion is timely filed and either (a) the defendant makes a substantial showing that he is entitled to relief or (b) the motion cannot be resolved without a factual hearing.” Smith, 144 Wn. App. at 863. Under State v. Smith, a superior court’s authority to address the merits of a CrR 7.8 motions is now limited to situations where the trial has determined that the motion is timely filed *and* the defendant has made a substantial showing s/he is entitled to relief or that an evidentiary hearing is required to resolve the motion. If the trial court makes such a determination, the court is to enter an order to show cause.

Eggum filed his CrR 7.8 motion on July 3, 2008, along with a note for docket setting a hearing for July 29th. CP 34-51, Supp. CP ____, Sub. Nom. 140. At the time the judge heard Eggum’s motion, the court had not

made a preliminary determination as to whether the motion was timely or not, and whether the motion made a substantial showing entitling defendant to the requested relief or required an evidentiary hearing. Supp. CP ___, Sub. Nom. 141; 7/29/08 RP 3. In fact, the prosecutor brought to the judge's attention that he didn't believe the court had the authority to address the merits of the motion, albeit on the basis that he thought the motion was untimely. 7/29/08 RP 3. After the court determined that it would consider the motion timely filed, due a clerk's error in processing the motion, the judge addressed the merits, without first deciding whether the motion made a substantial showing entitling the defendant to the requested relief or required an evidentiary hearing, as required by revised CrR 7.8. 7/29/08 RP 7-9. Without having made such a determination, the court did not have jurisdiction to address the merits of the motion.

While the Whatcom County Superior Court did not have jurisdiction to dismiss Eggum's post conviction motion on the merits without first determining that a show cause hearing was required, the State is not requesting that the matter be remanded back to the trial court for the trial court's initial consideration. The State is requesting, in the interest of

judicial economy, that the matter be treated as a personal restraint petition and decided as such by this Court.³

2. Eggum cannot withdraw his plea to count III, felony harassment, separate and apart from the indivisible plea agreement.

Eggum's motion requests that he be permitted to withdraw his guilty plea to count III of the information. On appeal, Eggum asserts "[a]ssuming arguendo that the State can establish indivisibility," he can attack this conviction separately from the rest of the indivisible plea agreement because he asserts that there is an insufficient factual basis to support his plea. Appellant's Brief at 14. Eggum's brief argument on this point relies upon State v. Knight, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008). Knight, however is predicated on a constitutional double jeopardy violation, whereby a trial court cannot enter convictions for offenses that constitute the same offense under double jeopardy jurisprudence. Moreover, Knight did not overrule or address State v. Bisson, 156 Wn.2d

³ Smith also held that converting the notice of appeal regarding the CrR 7.8 motion filed in that case to a personal restraint petition could infringe upon the defendant's right to choose whether he wanted the motion to be addressed as a personal restraint petition and therefore the matter should be remanded back to the trial court. Smith, 146 Wn. App. at 864. The defendant argued that remand was appropriate because the trial court had not given him notice that it might be converted to a personal restraint petition and that such a conversion would have future collateral consequences of subjecting him to the successive petition rule under RCW 10.73.140. Id. at 863-64. This portion of the Smith decision does not apply in Eggum's case because Eggum had already filed at least two collateral

507, 130 P.3d 820 (2006), which held that a defendant could not move to withdraw just the plea to sentencing enhancements based on involuntariness where the plea agreement was indivisible.⁴

A defendant may not challenge only a portion of a plea if the plea agreement was indivisible. State v. Ermels, 156 Wn.2d 528, 541, 131 P.3d 299 (2006).

[W]hen a defendant pleads guilty to multiple counts or charges at the same time, in the same proceedings, and in the same document, the plea agreement will be treated as indivisible, absent objective evidence of a contrary intent in the agreement.

State v. Turley, 149 Wn.2d 395, 402, 69 P.3d 338 (2003). If a defendant seeks to undo only a portion of a plea agreement, he will be precluded from doing so if the plea agreement was indivisible. *See*, Ermels, 156 Wn.2d at 540-42 (defendant could not challenge stipulations as to the factual and legal validity of an exceptional sentence or validity of appeal waiver where stipulations and waiver were part of plea agreement). Even where part of a plea is involuntary, a defendant is not entitled to *partial*

attacks on his conviction and already is subject to the successive petition rule in RCW 10.73.140.

⁴ The State in that case conceded that the defendant's plea was involuntary, because the defendant had not been informed that the sentencing enhancements would run consecutively to the offenses and one another, which the State does not concede here. Bisson, 156 Wn.2d at 509.

rescission of plea agreement. State v. Bisson, 156 Wn.2d 507, 518-19, 130 P.3d 820 (2006) (emphasis added).

Here, there can be no doubt that this was an indivisible plea agreement. The charges were amended from 15 counts to three, were contained in the same information and plea statement. Both counsel indicated at sentencing that this had been a heavily negotiated case. 1/24/07 RP 7, 9. In exchange for the prosecutor amending the information to reduced charges and recommending that Eggum receive credit for a significant amount of time he had spent on DOC violations related to the charges, Eggum pleaded guilty to the charges and agreed to an exceptional sentence. Eggum has received the benefit of his plea agreement and cannot challenge his felony harassment conviction under count III of the information separate from the rest of his plea agreement.

- 3. Even assuming that Eggum can contest the factual basis for his plea on the grounds that the court should not have construed his words as a threat to kill, the third amended affidavit of probable cause provided the factual basis to support the plea.**

In his motion Eggum asserted only that there was insufficient evidence before the court to find him guilty of the offense of felony harassment, claiming that the threats he made did not constitute a threat to kill. On appeal, Eggum transmutes his argument below into one of

voluntariness, presumably in order to be able to raise his issue in a constitutional context rather than the nonconstitutional context in which he would bear the burden of establishing a fundamental defect inherently resulting in a complete miscarriage of justice. Eggum merely claimed below that the evidence considered by the court did not support a finding that his statements constituted threats to kill, despite his plea admitting that they were. 7/29/08 RP 11-12. This claim does not amount to a fundamental defect resulting in a complete miscarriage of justice.

To obtain relief by way of a personal restraint petition, Eggum must establish either (1) actual and substantial prejudice arising from constitutional error, or (2) non-constitutional error constituting a fundamental defect inherently resulting in a “complete miscarriage of justice.”⁵ In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petition must set forth the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. In re Personal Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Bald assertions and conclusory allegations are insufficient. *Id.* In re Personal Restraint of Williams, 111 Wn.2d 353,

⁵ If the Court of Appeals reviews the trial court’s decision on its merits, and does not treat the CrR 7.8 motion as a personal restraint petition, Eggum still has failed to demonstrate how his motion falls within one of the five limited bases under CrR 7.8(b) for relief.

364-65, 759 P.2d 436 (1988). A court must decline to review a petition where it fails to meet the threshold burden of providing facts and evidence upon which to decide the issue. In re Cook, 114 Wn.2d at 814.

While CrR 4.2 contains procedural safeguards to ensure that a guilty plea is entered into knowingly, intelligently and voluntarily, the provisions of CrR 4.2 are not constitutionally mandated. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996); *see also*, In re Matter of Hews, 108 Wn.2d 579, 591-592, 741 P.2d 983 (1987) (“the establishment of a factual basis is not an independent constitutional requirement, and is constitutionally significant only insofar as it relates to the defendant's understanding of his or her plea”). The record of the plea hearing must show the plea was entered voluntarily and intelligently. *Id.* “When the record reveals that the defendant made a voluntary and intelligent decision to enter a plea agreement, factual or technical deficiencies underlying the agreement will not invalidate it.” State v. Hahn, 100 Wn. App. 391, 395, 996 P.2d 1125 (2000). A defendant’s plea of guilty admits factual and legal guilt for the charged offense. In re Bybee, 142 Wn. App. 260, 268, 175 P.3d 589 (2007). A defendant’s claim that the potential trial evidence, not presented due to the plea, would have been insufficient is irrelevant and precluded by the guilty plea. *Id.*

A factual basis to support a plea exists if there is evidence in the record from which a jury could conclude that the defendant is guilty: proof beyond a reasonable doubt, however, is not required. State v. Sass, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). The trial court may consider any reliable source of information in the record at the time of the plea. *Id.* To convict a person of felony harassment requires proof that the defendant knowingly threatened to kill and the victim reasonably feared that the threat would be carried out. State v. C.G., 150 Wn.2d 604, 608-09, 80 P.3d 594 (2003). However, the threat to kill need not be literal: “the nature of a threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.” *Id.* at 611; RCW 9A.46.020.

Eggum’s motion asserts only that there was insufficient evidence before the court to find him guilty of the offense of felony harassment, claiming that the threats he made did not constitute a threat to kill. He did not assert that he did not possess an understanding of the law in relation to the facts at the time of his plea. Eggum’s claim that his threats should not have been construed by the court as a threat to kill, that he had intended a different threat, do not rise to the level of an allegation beyond a mere

factual deficiency in his plea proceeding. As such, the motion does not provide a sufficient basis for a collateral attack on his conviction.

Moreover, it's clear that the third amended information provided the factual basis to support his plea (App. A, CP 162-171). In the letter sent to his ex-wife's attorney, Eggum threatened that if his ex-wife took the money: "it will be the biggest mistake of her life," and "You are playing your *last* hand now. Once your hand is played, I still get to play the cards left in my hand, and my hand will be the *last* hand, and there is a trump card in my hand." CP 170 (emphasis added). A few months before this threat, Eggum stated in a letter that he knew that his ex-wife was trying to steal his last \$60,000 equity in his home "which again solidifies her getting killed if they let me out." CP 170. Taking Eggum's threats in the context of his other actions, stalking of his ex-wife and other prior more explicit threats to kill her, the third amended affidavit of probable cause provides a sufficient factual basis for his plea to felony harassment. *See, State v. Binkin*, 79 Wn. App. 284, 291-92, 902 P.2d 673 (1995) *rev. den.*, 128 Wn.2d 1015 (1996), *abrogated on other grounds*, *State v. Kilgore*, 147 Wn.2d 288, 902 P.2d 673 (2002) (defendant's prior threats admissible to determine whether victim's fear was reasonable regarding

harassment charge). As noted by the trial court when it was deciding the motion:

Mr. Eggum, you pled guilty to communicating a death threat. You pled guilty to that offense admitting that you communicated a threat of death. You come now and argue that the language that is contained within the affidavit in support of probable cause cannot reasonably be interpreted as a threat of death but rather as a threat to publish movies involving your ex-wife. Those words, in this court's view, are capable of being interpreted, depending on the intent of the speaker either in support of what you're saying or in support of an intent to harm or to kill. And when you come in and you plead guilty to that and acknowledge to me that that's in fact what you intended to do, that's in fact what you did, was communicate a threat as alleged in the information and the words contained in that communication could be indirectly interpreted as communicating that threat, then this court found you guilty.

To come in a then a year-and-a-half later and say no, there wasn't anything there to support it, I can't accept that argument. It could be interpreted either way and I'm not going to go back now and reinterpret in a way that's contrary and inconsistent to what you admitted to me at the time of the plea you did.

7/29/08 RP 15-16.

It's also clear from a review of the colloquy at the time of the plea that Eggum was provided with a copy of the Fourth Amended Information, reviewed the plea statement with his attorney for an hour before entering his plea, understood his plea, had no questions about his plea and entered his plea voluntarily. 1/24/07 RP 3-5. His written plea statement is further

evidence that his plea was voluntary. *See, State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982).

There was and is a factual basis to support Eggum's plea of guilty to felony harassment. His plea was voluntary. Eggum cannot now challenge the validity of his plea on the asserted grounds of insufficient evidence based on how he would have the court interpret his words. His CrR 7.8 motion/petition should be denied.

4. Eggum's collateral attack also should be dismissed as a successive petition.

Eggum filed his CrR 7.8 motion attacking the validity of his plea after having previously filed two CrR 7.8 motions. His filing of a third collateral attack is a successive petition. As such, he is required to comply with RCW 10.73.140. His failure to do so precludes review by this Court.

Successive collateral attacks via CrR 7.8 motions must comply with the requirements of RCW 10.73.140. CrR 7.8(b); *State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992). Under RCW 10.73.140 the defendant has an obligation to certify that he has not filed a previous petition on similar grounds and to show good cause as to why he did not raise the grounds in an earlier petition. RCW 10.73.140. Failure to make such a good cause showing subjects a CrR 7.8 motion to summary dismissal. *In re Personal Restraint of Holmes*, 121 Wn.2d 327, 329-30,

849 P.2d 1221 (1993); *see also*, Brand, 120 Wn.2d at 369-371 (a court may not consider a CrR 7.8(b) motion if the movant has not certified that he has not filed a previous motion on similar grounds).

Eggum failed to comply with the requirements for filing a successive petition, and thus his motion is procedurally barred from consideration. While this third collateral attack asserts a different basis for vacating his convictions than his previous ones, Eggum has failed to show good cause as to why he did not assert this current challenge to his conviction in his prior motions. He has failed to even address the good cause showing, and none is apparent from his CrR 7.8 motion. His failure to show good cause for not asserting this issue in his prior collateral attack precludes this Court's review.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court treat Eggum's CrR 7.8 motion as a personal restraint petition and dismiss it.

Respectfully submitted this 22nd day of September, 2009.


HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Dana M. Lind, addressed as follows:

Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122

Sydney A. Koss
Legal Assistant

9/23/2009
Date

APPENDIX A

1 EGGUM's records used the initials CB to refer to Jerry Hemple and the initials TFB to reference
2 Janice Gray. DOC officers concluded this upon comparing the victims' notes and MARLOW
3 TODD EGGUM's notes. Also during the search of MARLOW TODD EGGUM's vehicle,
4 officers found a pair of binoculars, and two walkie talkies.

5 On 3/04/05 MARLOW TODD EGGUM wrote that TFB stayed in town after a hearing
6 and upon his return to Lynden he positively saw CBV which would be Hemple's vehicle headed
7 southbound on Guide Meridian, "probably to meet TFB."

8 On 3/10/05 Hemple received a call at his residence from a number traced to a pay phone
9 at a Chevron station. Janice Gray had also received a phone call from that same Chevron Station
10 pay phone about 15 minutes afterwards.

11 On 3/19/05 Hemple received a call in which the caller threatened to break Hemple's legs.
12 The call registered on Hemple's caller ID and was later traced to a pay phone at the Red Apple
13 Market in Everson. Hemple took the threats seriously and filed a report with the Lynden Police
14 Department. In reviewing MARLOW TODD EGGUM's notes he had written the name Tanya
15 Harding. Tanya Harding is famous for attempting to have her competition's legs broken.
16 Hemple purchased a firearm shortly afterwards.

17 On 3/25/2005 MARLOW TODD EGGUM had written that he was traveling towards
18 Birch Bay when he saw CB turning onto a road at 8:05 p.m. In another entry on 3/21/05
19 MARLOW TODD EGGUM described how TFB was seen northbound at 8:05 and she appeared
20 to be "solo." MARLOW TODD EGGUM then noted that he did not see CB after he saw TFB
21 unlike what he observed on the prior Wednesday. In MARLOW TODD EGGUM's records, he
22 also wrote in an entry dated both 3/25/2005 and 3/26/2005 that CB was definitely out of town
23 starting 3/25/05. MARLOW TODD EGGUM wrote that TFB was to be in Canada during that
24 time. Janice Gray confirmed that she had told her daughter Krystal that she would be in Canada
25 during that period. Gray's notes dated 3/26/05 and 3/28/05 confirmed that MARLOW TODD
26 EGGUM had tracked her and her friend Jerry Hemple's movements during that time, because
27 MARLOW TODD EGGUM had accurately noted that Gray and Hemple were out of town in
28 Canada.

29 On 3/30/05 Hemple received a threatening answering machine message in which the
30 caller whispered, "You want my number, why don't you answer the phone?" and "Find your
31 own bitch." It is important to know that MARLOW TODD EGGUM refers to Gray as a bitch in
32 an entry dated 3/25/05.

33 On 4/1/05 Hemple reported to Gray that he received a call at 7:06 a.m. and that the
34 number was traced to a pay phone located at a Chevron station on Guide Meridian in
35 Bellingham.

36 On 4/3/05 Hemple reported that he had received a call at 8:00 a.m. that date. The phone
37 number was traced to a pay phone at a liquor store on Lakeway Drive in Bellingham. On 4/3/05
38 MARLOW TODD EGGUM noted that he saw a maroon Dodge 4x4 pickup truck with a
39

1 matching canapé. It is important to know that Jerry Hemple drives a maroon pickup truck.
2 MARLOW TODD EGGUM also noted that he saw a maroon F-150 pickup on 4/4/05. A few
3 days later in his records MARLOW TODD EGGUM wrote "note! A05598R-JH." This is Jerry
4 Hemple's vehicle license number. MARLOW TODD EGGUM also wrote, "Note! 454PCV Red
5 Chevy." This is Jerry Hemple's mother's vehicle's license number.

7 On 4/14/05 Hemple paid for a gun handlers permit to legally carry the firearm that he
8 purchased.

9 On 4/18/05 Hemple documented that while shopping in the freezer section of Safeway in
11 Lynden he suddenly observed MARLOW TODD EGGUM standing 2 feet away from him just
12 staring at him. MARLOW TODD EGGUM asked Hemple for his first and last name.
13 MARLOW TODD EGGUM began questioning him about his relationship with his wife.
14 Hemple said that MARLOW TODD EGGUM claimed the divorce was not finalized. Hemple
15 also told MARLOW TODD EGGUM not to call him anymore and made references to the
16 payphone calls that were made. After this conversation Hemple stopped receiving calls from pay
17 phones.

19 On 4/29/05 Hemple and Gray were walking south on Vinup and observed MARLOW
21 TODD EGGUM drive south past them. About 40 minutes later they walked on Depot Road and
22 saw MARLOW TODD EGGUM driving near them.

23 On 5/3/05 Hemple and Gray walked on their regular walking route on Grover Street and
25 saw MARLOW TODD EGGUM driving toward them. As MARLOW TODD EGGUM drove
26 past Hemple saw MARLOW TODD EGGUM looking at them with a smile on his face.

29 On 5/4/05 Hemple observed MARLOW TODD EGGUM just after 6 p.m. on the Birch
31 Bay-Lynden Road. Hemple noted that MARLOW TODD EGGUM was just sitting in his
30 vehicle and that no one else was around.

33 On 5/5/05 Hemple received a voice message from a woman named Renee. She said that
34 "they wanted to talk to him" and made references to Krystal who is Janice Gray's daughter.

37 On 6/6/05 DOC officer called MARLOW TODD EGGUM's mother Lorraine and she
38 indicated that MARLOW TODD EGGUM has a friend named Renee.

39 On 5/7/05 Hemple documented that MARLOW TODD EGGUM approached him in the
41 parking lot at Safeway. Hemple said that as he was getting into his truck, he observed
42 MARLOW TODD EGGUM standing about 20 feet away from him. Hemple noted that it
43 appeared as if MARLOW TODD EGGUM was waiting for him. MARLOW TODD EGGUM
44 approached Hemple and made threatening statements to him. MARLOW TODD EGGUM said
45 that if he wanted to he could get people who he met in jail to stop Hemple from seeing Gray.
46 MARLOW TODD EGGUM then referenced a domestic violence murder that occurred several
47 years ago in Lynden where a husband beat his wife and beat her boyfriend to death with a
48

1 hammer. MARLOW TODD EGGUM said that he would do something similar to this but not
use a hammer.

3 On 5/15/05 Hemple and his mother exited Christ the King Church in Bellingham and saw
5 MARLOW TODD EGGUM slumped down in his vehicle about 20 feet away from Hemple's
7 mother's vehicle. Hemple reported that MARLOW TODD EGGUM made eye contact with him
9 as he and his mother went to her vehicle. Later that evening Gray picked up Hemple at his
11 residence and went to Christ the King Church for a small group meeting. They arrived there
13 about 6:00 p.m. and observed MARLOW TODD EGGUM driving around the church parking
15 lot. Gray reported that MARLOW TODD EGGUM looked at them and drove slowly past them.
17 Gray parked her vehicle near the church entrance and then observed MARLOW TODD EGGUM
19 driving his vehicle back toward them. Gray and Hemple decided not to attend the group meeting
21 because of MARLOW TODD EGGUM. Hemple observed MARLOW TODD EGGUM quickly
23 walking ahead of him to enter the church when Hemple walked toward the church to tell
25 members he would not be attending. Later that evening Gray dropped Hemple off at his
27 residence around 8 p.m. and then returned to Hemple's residence about 15 minutes later. As she
drove to Hemple's residence she observed MARLOW TODD EGGUM drive past her. Gray
stayed there until about 8:35 and then went home. Hemple called Gray at 9:24 and reported that
he had just seen MARLOW TODD EGGUM speed by his house again and that he and
MARLOW TODD EGGUM made eye contact. In MARLOW TODD EGGUM's notes he
describes the same stalking occurrences. MARLOW TODD EGGUM wrote that he saw TFB
and CB at Christ the King at 6:30 p.m. MARLOW TODD EGGUM also wrote that TFB
dropped CB off at CB's house at 8:15 and that CB was alone at his house until 9:00 with the
lights on. MARLOW TODD EGGUM's notes dated 5/17/05 indicate that he continued to try to
track Hemple at Hemple's residence.

29 On 5/23/05 MARLOW TODD EGGUM documented that Hemple and Gray went to the
Fairway Café for dinner. Gray in her notes from that day show that she saw MARLOW TODD
31 EGGUM looking at them through the Café window.

33 On 5/23/05 Hemple and Gray were walking at a park in Lynden and heard a strange noise
in the park. Gray and Hemple believed that they were being stalked by MARLOW TODD
35 EGGUM at that point because he had been repeatedly following them through town. Gray and
Hemple left the park in their own vehicles and as Hemple left he observed MARLOW TODD
37 EGGUM's car parked there. Later on 5/25/05 Hemple observed MARLOW TODD EGGUM
drive past his house at 6 p.m. At 7:05 p.m. Hemple received a call at this residence from a caller
39 registered as unknown on the caller ID. The caller hung up after Hemple answered the phone.

41 On 5/26/05 Hemple was driving on Front Street and MARLOW TODD EGGUM drove
43 past him as he turned off on Guide Meridian on Front Street. Hemple drove into the Safeway
parking lot and Hemple noticed that MARLOW TODD EGGUM had turned around and
45 followed him to Safeway. Due to MARLOW TODD EGGUM's actions, Hemple left the
Safeway and went to another grocery store.

1 On 5/27/05 Hemple was driving East with on Gray on Main Street in Lynden and
Hemple observed MARLOW TODD EGGUM following him a few cars back in the mirror.

3 On 5/29/05 Hemple was approached by MARLOW TODD EGGUM at Christ the King
5 Church in Bellingham. MARLOW TODD EGGUM asked Hemple to go out for coffee with him
and also stated, "You're not dating my wife, huh?" Hemple declined the invitation. Other
7 witnesses corroborate that MARLOW TODD EGGUM contacted Hemple at that time.

9 On 5/31/05 Hemple went for a walk with Gray and then went to the Fairway Café for
lunch. Hemple observed MARLOW TODD EGGUM drive past the Fairway Café. At 2:45
11 Hemple went to pay his bill at the cash register and at that time observed MARLOW TODD
EGGUM in the Café by himself. MARLOW TODD EGGUM made eye contact with Hemple
13 and walked behind him. MARLOW TODD EGGUM's records dated 5/31/05 recorded this
incident. Hemple left the Fairway Café and went to Safeway at approximately 3:30. Hemple
15 looked around to see if MARLOW TODD EGGUM was there and did not see him. While inside
the Safeway Hemple suddenly observed MARLOW TODD EGGUM walking past him. They
17 made eye contact. Hemple used his cell phone to call the police and when MARLOW TODD
EGGUM observed Hemple on the cell phone he left.
19

21 During the time that MARLOW TODD EGGUM followed Hemple he was also
following Gray. MARLOW TODD EGGUM wrote that on 3/4/05 Gray stayed in town after a
23 hearing. MARLOW TODD EGGUM knew this because he had followed her.

25 On 3/21/05 MARLOW TODD EGGUM documented that his daughter Krystal had told
him that Gray had just dropped her off t school and that Gray was on her way back home.
27 MARLOW TODD EGGUM's next entry wrote about how Gray was not at home on 3/16/05
after he dropped Krystal off at 7:45 p.m. On 3/26/05 MARLOW TODD EGGUM notes that
29 Gray traveled to Canada based on information that he learned from Krystal. MARLOW TODD
EGGUM then wrote how Gray did not return to Lynden until about 11:30 p.m. On 3/30/05 Gray
31 noted that she left work to take a walk by herself and MARLOW TODD EGGUM drove out off
a side street unto the road Gray was walking on. Gray reported that MARLOW TODD EGGUM
33 passed her and stopped. MARLOW TODD EGGUM then stuck his head out the car window
and was looking at her.
35

37 On 4/4/05 Gray noticed MARLOW TODD EGGUM drive past her on Depot Road after
she dropped their daughter off at school. MARLOW TODD EGGUM's notes indicate that he
39 saw Gray on 4/4/05 at the Flying Dutchman Café.

41 On 4/5/05 Gray drove her daughter to church and she saw MARLOW TODD EGGUM
43 drive past her on Front Street.

45 On 4/8/05 Gray received a call on her cell phone from a pay phone that was located at
Glenn Shamrock Pub.
47
49

1 On 4/12/05 Gray told Krystal that she was going to go out. On 4/16/05 Krystal told Gray
3 that, "Daddy will know." Krystal reported that MARLOW TODD EGGUM had asked her
5 where Gray had gone and when she said she did not know MARLOW TODD EGGUM asked
7 her to call Gray and find out.

9 On 4/15/05 Gray was driving to work at 7:49 a.m. on Badger Road in Lynden and Gray
11 observed MARLOW TODD EGGUM driving toward her also on Badger. Later on that day
13 Gray dropped Krystal off at the roller rink, then drove to Walmart and observed MARLOW
15 TODD EGGUM park near Homes at Sales, facing the Guide.

17 On 4/18/05 Gray noted MARLOW TODD EGGUM drive past her on Depot Road when
19 she dropped Krystal off at school at 7:33 a.m.

21 On 4/23/05 Gray returned home after visiting with a friend in Skagit County around 9:15
23 p.m. When she pulled up to her residence she observed Krystal opening the garage door.
25 Krystal was scheduled to be with her father at that time. Gray asked Krystal what she was doing.
27 Gray noted that Krystal looked upset and told her that MARLOW TODD EGGUM wanted
29 Krystal to find out where Gray was.

31 On 4/29/05 Gray and Hemple went for a walk on Vinup Street in Lynden and MARLOW
33 TODD EGGUM drove by quickly in the same direction. About 40 minutes later Gray observed
35 MARLOW TODD EGGUM drive near them on Depot Road and turn onto Woodfield Street. On
37 4/29/05 Gray dropped Krystal off at the Fairway Café parking so she could walk to MARLOW
39 TODD EGGUM's residence and pick up her roller skates. As Gray was waiting for Krystal to
41 return Gray observed MARLOW TODD EGGUM drive past on Front Street. When Krystal
43 returned she informed Gray that MARLOW TODD EGGUM had been at his residence when she
45 arrived.

47 On 5/13/05 Gray's co-worker received a phone call for Gray at her workplace. The caller
49 said that his name was "Dick." Gray reported that she does not know anyone by that name.

MARLOW TODD EGGUM is currently in DOC custody and therefore will not respond
to a Summons. The State requests a Warrant for his Arrest.

On 8/13/05 Cardella Rick was visiting TODD MARLOW TODD EGGUM's mother at
her house in Whatcom County, Washington when TODD called from prison. TODD asked to
speak with Cardella about Janice Gray. TODD said that he would like Cardella to call Janice
and tell her to contact him. Cardella told him that was not a good idea and mentioned that they
were divorced and that he should move on with his life. TODD said, "I just can't." TODD
asked if Janice had a new boyfriend. Cardella told TODD that she did not know. TODD said,
"Well, if she does, when I get out of prison I'm going to kill her." Cardella said that he would be
sent to death row for that and TODD said that he already had a solution. Cardella asked if that
meant that he would kill himself and he said, "Yeah, you're right." Cardella called Janice Gray
and told her about the threat. She left a message at Janice's voice mail at work. Janice felt
threatened and was in fear that the threat would be carried out.

1 On March 19, 2005 Jerry Hemple received a telephone call from someone who said that
3 they were going to break his legs, etc. The telephone call came from a pay phone at Red Apple
5 Market in Everson and the phone number was 966-9991. On April 18, 2005, Jerry Hemple
7 spoke with MARLOW TODD EGGUM at the Safeway in Lynden. Jerry Hemple was able to
recognize MARLOW TODD EGGUM's voice as the person who had called him on March 19th
and left a threat to break Jerry's legs.

9 While speaking with MARLOW TODD EGGUM on April 18th, MARLOW TODD
11 EGGUM repeatedly told Jerry Hemple to tell Janice Gray that he needs to tell her that she can
13 put an end to this by speaking with MARLOW TODD EGGUM. Jerry Hemple conveyed this
15 message to Janice Gray. This third party contact is in violation of a No Contact Order from a
17 Whatcom County Superior Court judgment and sentence that was filed in court on February 7,
19 2005. MARLOW TODD EGGUM is the defendant in that matter and Janice Gray is the victim.
21 MARLOW TODD EGGUM is to have no contact with Janice Gray including indirect contact or
23 third party contact. On Saturday, April 30, 2005 Janice Gray went to church in Bellingham,
25 Whatcom County, Washington. She met a friend in the Cordata Christ the King Church and they
decided to walk to Dairy Queen and then go to church. When Janice was leaving the church
lobby MARLOW TODD EGGUM passed in front of Janice facing into the church. Janice told
her friend that TODD had just passed and they left right away. MARLOW TODD EGGUM left
the church shortly afterward. Janice hid in her friend's car's front seat, below the window line so
that she could not be seen. MARLOW TODD EGGUM called Janice and his daughter at about
9:00 p.m. to ask if Janice was at his church.

27 On May 7, 2005 MARLOW TODD EGGUM contacted Jerry Hemple at the Safeway in
29 Lynden, Whatcom County, Washington. He apparently had been waiting for Jerry to come out
31 of the store. MARLOW TODD EGGUM said to Jerry that Janice is still his wife and that if he
33 ever caught someone doing something with her he would have to do what he would have to do,
like the trailer park incident in Lynden, but it wouldn't be with a hammer. MARLOW TODD
EGGUM was referring to a recent homicide in Lynden where an estranged husband used a
hammer to murder a new suitor of his estranged wife.

35 On May 23, 2005 Jerry Hemple and Janice Gray went to the Fairway Café to eat at about
37 1810 hours. Hemple was facing a window and Gray was sitting across from him. MARLOW
39 TODD EGGUM came up to the window which was behind Gray, looked directly in and shook
41 his head from side to side in an "No" manner. MARLOW TODD EGGUM then turned and
43 walked away. Gray turned around and saw MARLOW TODD EGGUM at that time. During
45 that time there was a valid No Contact Order in place from the above-mentioned February
47 Judgment and Sentence. On May 15, 2005 Janice Gray and Jerry Hemple were going to church
in Bellingham. At around 6:00 p.m. they turned off the Guide past Izzy's restaurant and saw
MARLOW TODD EGGUM driving in the opposite direction on the part of the lot that exits or
enters Christ the King Church. He appeared to be leaving church. He drove by it slowly and
looked at Hemple and Gray. Hemple and Gray drove south and turned left in front of the church
and then north again and parked. When Gray turned left and looked straight ahead she saw

1 MARLOW TODD EGGUM's car coming straight towards them. Gray did not go into the
church at that time. Jerry Hemple saw TODD walking very hurriedly to get into church.

3 On Friday, June 3rd, 2005 Janice Gray spoke with her daughter Krystal about MARLOW
5 TODD EGGUM's arrest. Janice told her that MARLOW TODD EGGUM was in prison and
7 Krystal's reaction was a question, "for how long?" Krystal then hesitantly said that her dad told
her that if he ever goes to jail again, when he gets out he's going to do something. Janice asked
9 her, "what do you mean, he's going to do something?" Janice then asked, "to me?" Krystal
nodded her head. Janice asked Krystal if MARLOW TODD EGGUM said he was going to hurt
11 Janice and Krystal said yes. This conversation took place in Lynden, Whatcom County,
Washington. This threat happened while a valid No Contact Order was in place from the above
13 mentioned February Judgment and Sentence.

15 On 4/21/2005 Pauline Rose stopped at the Safeway to get some gasoline in Lynden,
Whatcom County, Washington. From there she drove home about 2.5 miles away at which time
17 she noticed MARLOW TODD EGGUM passing her driveway going very slow like he had had
to stop so that Pauline could back up into her driveway. Pauline recognized MARLOW TODD
19 EGGUM from her work at the Prosecutor's office and knew that MARLOW TODD EGGUM
had been convicted of stalking in the past. On Sunday, May 1st, Pauline went to the 9:30 service
21 at Christ The King Church in Bellingham, Whatcom County, Washington and sat up front. After
services she went to the ladies room and then to a prayer vigil sign-up sheet area before she
23 began to leave. As she turned to leave MARLOW TODD EGGUM walked past her and she
nearly bumped into him. Pauline had never seen MARLOW TODD EGGUM at this service at
25 Christ The King in the past. On Thursday, May 5th Pauline was driving her WTA Vanpool Van
and dropped off her last passenger on Garden Street in Lynden where she saw MARLOW
27 TODD EGGUM driving directly behind her going north on Bender Road. Pauline parked the
van at Homestead Fitness Center and got into her truck for the drive home. She went north to
29 Badger Road and then west to Berthusen and then when she turned south before Main Street she
saw MARLOW TODD EGGUM driving north on Berthusen. This was approximately 12
31 minutes after seeing him the first time. On Saturday, May 7th, Pauline was parked at Lynden
Mower on Front Street talking to her brother on the cell phone and MARLOW TODD EGGUM
33 drove past. It was 1:52 p.m. On Saturday, May 14th, Pauline met friends at church and
MARLOW TODD EGGUM was there again. On Thursday, May 19th, Pauline received a
35 message from her neighbor named Karen Smith who saw a man who looked like MARLOW
TODD EGGUM walking on her Pauline's neighborhood street. All the acts regarding Pauline
37 happened in Lynden, Whatcom County, Washington.

39
41 On Sunday, May 29, 2005 Sheryl Cartwright left her home around 12:00 noon to put
flowers on the grave of her relatives in Lynden, Whatcom County, Washington. As she was
43 entering into Lynden going north on Birch Bay-Lynden Road she noticed MARLOW TODD
EGGUM's Honda CRX exiting the Safeway parking lot onto Birch Bay-Lynden Road. As
45 Sheryl passed him MARLOW looked at her from the driver's seat of his car. Sheryl moved into
the left hand turn lane at the traffic light at the corner of Birch Bay-Lynden Road and Guide
47 Meridian and MARLOW proceeded east in the lane to go straight from Birch Bay-Lynden to
Kok Road. As he went past Sheryl he stared into the truck at her obviously recognizing her. The
49

1 left hand arrow green light came on and Sheryl turned left on the Guide Meridian and had to pass
2 by MARLOW as he still had a red light. MARLOW TODD EGGUM stared at Sheryl as she
3 passed him. Once on Guide Meridian Sheryl got into the right lane in order to purchase flowers
4 at Rite Aid. Prior to entering the Rite Aid parking lot Sheryl noticed in her rear-view mirror that
5 MARLOW did cross Guide Meridian onto Kok Road. Sheryl parked the truck in the Rite Aid
6 parking lot, walked toward the entrance, and as she crossed the parking lot a pickup stopped to
7 allow her and right behind the pickup was MARLOW in his Honda CRX. Again he stared at
8 her. Sheryl purchased flowers at Rite Aid at 12:38 and placed them in the bed of the pickup
9 truck. Thinking that MARLOW may still be around, Sheryl looked for his car but did not see it
10 and then drove north on the Guide and then turned east on Front Street. Sheryl was unable to
11 enter the cemetery because there was a line of cars on Front Street because this was Memorial
12 Day weekend. Sheryl went to the easterly entrance from Front Street and then drove to her
13 family plot which is at the extreme southwest corner of the cemetery. Sheryl parked her truck
14 and took the flowers from the bed of her pickup when she noticed that MARLOW was driving
15 north on Guide Meridian and was again looking at her. Sheryl watched as he turned into the
16 AM/PM gas station across from the cemetery. Less than two minutes later MARLOW drove
17 south on the Guide, again looking at Cheryl. About 1:00 Cheryl's husband called on the cell
18 phone and she told him about seeing MARLOW. About 1:14 Cheryl's husband called again and
19 she said that she had not seen MARLOW since he called the first time.

21 * On 10/31/2005 MARLOW EGGUM mailed a letter to the Whatcom County Prosecutor's
22 office making it clear that he was angry about recent DOC violations and also knowing that the
23 prosecution was gearing up for trial on a new stalking matter and indicated that such activities
24 would cause a response from MARLOW EGGUM in the future. EGGUM indicated that
25 anything done to him by DOC or the Whatcom County Prosecutor's Office would be considered
26 done by Janice. EGGUM stated that he would pay Janice back. EGGUM stated that Janice,
27 himself and his daughter will be paying a much higher price when he gets through sitting out his
28 time because his reaction will be a "known outcome." Janice Gray learned of the letters and
29 believes that this is a threat to kill her and she believes that EGGUM will carry out the threat.
31

33 On 1/3/06 the Prosecutor's office received a letter from MARLOW EGGUM that was
34 sent to a "Vince." In that letter EGGUM stated that he knows that Janice is trying to steal my
35 last \$60,000.00 equity in the home which again solidifies her getting killed if they let me out."
36 Janice Gray learned of the letters and believes that this is a threat to kill her and she believes that
37 EGGUM will carry out the threat.

39 On May 8, 2006 MARLOW EGGUM sent a letter to Lisa Fasano. In that letter he told
40 Lisa Fasano that if Janice takes his money, "it will be the biggest mistake of her life, so my
41 advice to you would be for you to tell her what cost she is going to end up paying." He further
42 went on to say, "You should be telling her to walk away from the fire. Here's some more advice.
43 If she's going to be stupid enough to steal it, then at least advice her to spend it all quickly." At
44 the end of his letter EGGUM stated, "You are playing your last hand now. Once your hand is
45 played, I still get to play the cards left in my hand, and my hand will be the last hand, and there is
46 a trump card in my hand. At this stage, it is only a matter of when I get to go next." Janice Gray
47

49
AFFIDAVIT OF PROBABLE CAUSE
DETERMINATION

1 learned of the letters and believes that this is a threat to kill her and she believes that EGGUM
will carry out the threat.

3 On July 18, 2002, the Whatcom County Prosecutor's office received a large stack of
5 printed material that came from floppy computer disks received from the new owners of
7 EGGUM's house. The printed material includes logs of stalking that EGGUM perpetrated on
9 Janice Gray and others. EGGUM's logs indicate that he began doing drive-bys of Jerry
Hemple's work and residence in May of 2002. EGGUM's logs and Jerry's recollection show
that the drivebys and contacts continue from that period to 5/31/05.

11 All of the above events occurred in Whatcom County, Washington.

13
15 Eric J. Richey, #22860
Deputy Prosecuting Attorney

17
19 SUBSCRIBED AND SWORN to before me this 20 day of ^{July} ~~January~~, 2006.

21
23 Burget J. Gumboro
NOTARY PUBLIC in and for the State of
Washington. My commission expires: June 9, 2008