No. 91176-2
Court of Appeals No. 70516-4-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES M. MCCLURE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

James M. McClure, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. McClure requests this Court grant review of the decision of the Court of Appeals, No. 70516-4-I (November 17, 2014). A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The constitutional right to a public trial and to be present extends to jury selection. As the parties were preparing to conduct voir dire, the court informed them, without explanation or elaboration, that two potential jurors were excused. Under these circumstances, does the Court of Appeals ruling that the record does not establish the courtroom was closed conflict with decisions by this Court, raise a significant question of law under the state and federal constitutions, and involve an issue of substantial public interest that should be determined by this Court?

2. To convict a defendant of harassment by a threat to kill, the constitutional right to free speech requires proof beyond a reasonable doubt that the threat was a "true threat," that is, a statement made in a context or under such circumstances wherein a reasonable person would foresee the statement would be interpreted as a serious expression of

intention to take the life of another. Mr. McClure had a history of placing repeated calls to a 911 dispatch center, which were frequently crude, inappropriate, rambling, and disjointed. When a police officer warned Mr. McClure to stop making unnecessary calls to the dispatch center, he immediately placed several calls to the center, including one call in which he made several enigmatic references to the officer, stated "the Admiral" wanted the officer to become "a smoking hole," and "when I blast, there's nothing left. I'll take out that filbert or walnut farm, his wife, his kids." The dispatcher was not alarmed by the content of the call but when the officer listened to the call several days later, he was alarmed for his wife's safety. Under these circumstances, does the Court of Appeal's ruling that a reasonable person in Mr. McClure's position would foresee his enigmatic comments would be interpreted as a serious statement of intent to kill the officer's wife conflict with decisions by this Court and another decision by the Court of Appeal regarding true threats, raise a significant question of law under the state and federal constitutions, and involve an issue of substantial public interest that should be determined by this Court?

3. Due process requires the State to prove beyond a reasonable doubt every essential element of a crime charged. A conviction for harassment by a threat to kill requires proof beyond a reasonable doubt that the person threatened reasonably feared that the threat to kill would be

carried out. The officer's wife testified that she feared Mr. McClure would "do something," "it was very credible that this person was capable of doing what he said he was going to do," and she was "very concerned" for her safety. In the absence of testimony that the officer's wife feared Mr. McClure would kill her, does the Court of Appeal's ruling to the contrary conflict with decisions by this Court regarding reasonable fear a threat to kill will be carried out, raise a significant question of law under the state and federal constitutions, and involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

For a period of time in 2008, James McClure placed repeated, rambling, and often disjointed calls to the Island County 911 dispatch center, sometimes 20 calls in a single night. 5/14/13 RP 61. Lieutenant Michael Hawley and other deputies made numerous trips to Mr. McClure's home in futile attempts to stop him calling 911 unless he needed assistance. 5/14/13 RP 62-63. During the same time period, Lieutenant Hawley learned that Mr. McClure was arrested for brandishing a flare gun in an attorney's office and that another attorney obtained a protection order against Mr. McClure for harassing telephone calls. 5/14/13 RP 64. Based on the protection order, Lieutenant Hawley removed six to twelve guns from Mr. McClure's home. 5/14/13 RP 65.

Mr. McClure resumed his repeated calls four years later in mid-December 2012, and he frequently asked to speak with a specific dispatcher, Erin Petersen. 5/14/13 RP 65-67. In some calls, Mr. McClure seemed intoxicated, or he used sexual or crude language. 5/15/13 RP 196, 197, 224-25. Deputies again futilely told him to stop calling unless he needed assistance. 5/14/13 RP 66. In late December, Mr. McClure went to the dispatch center and left a package addressed to Ms. Petersen. 5/14/13 RP 68; 5/15/13 RP 198. The bomb squad was called but the package contained only playing cards, a book about poker, and some notes. 5/14/13 RP 68, 70; 5/15/13 RP 199.

Lieutenant Hawley opened an investigation into Mr. McClure for telephone harassment of Ms. Petersen and he went to Mr. McClure's home several times to speak with him, but Mr. McClure was not home. 5/14/13 RP 70-71. Lieutenant Hawley then called Mr. McClure and warned him that he would be arrested if he did not stop calling 911. 5/14/13 RP 73. Immediately afterwards, Mr. McClure placed repeatedly called 911, including one call in which he and Ms. Petersen had the following conversation:

JAMES MCCLURE: This is a message for whoever the senior bastard is, you have a Hawley that used to be sheriff.
ERIN PETERSEN: Okay.
JAMES MCCLURE: I had to sign a letter that said I would not talk about, discuss or release any press releases for 20 years after I got out

of the Navy. And I got out of the Navy on the 31st of May, 1993. But due to Internet technology and everything else, it's leaking out.

So I'm kind of fuzzy a little bit. So I cleared it with three Navy captains and an admiral.

ERIN PETERSEN: Okay.

JAMES MCCLURE: Lives right here on Whidbey Island. They're all retired.

ERIN PETERSEN: So you weren't supposed to do – You weren't supposed to talk about what? I'm sorry.

JAMES MCCLURE: Everything I did in the Navy.

ERIN PETERSEN: Okay.

JAMES MCCLURE: Okay. Any my Navy references are: VO-67, Albadron-67 (phonetic), VAH-21, Heavy 21.

ERIN PETERSEN: Mm-hmm.

JAMES MCCLURE: And I had an Ace of Diamonds and a Queen of Spades painted on my tail. Yes, ma'am. I put 'em up there myself.

ERIN PETERSEN: Mm-hmm.

JAMES MCCLURE: Pretty thing. Pretty thing. Gun ships, ma'am. Gun ships.

And after I talked to captain -- Well, I talked to the Master Chief first. He's here, too. He talked with Captain. Captain called me. Captain called the Admiral. Admiral approved it.

He says, "Forget about that last five months, Chief. Go ahead and let him have it."

ERIN PETERSEN: Okay.

JAMES MCCLURE: You know what the Admiral wants to see happen to Mike Hawley?

ERIN PETERSEN: Oh. I don't know.

JAMES MCCLURE: Smoking hole (indiscernible). I don't know what he did to piss the admiral off, but the admiral said, "Chief, you're flying tonight in a black airplane. We're all going to bed with their wives, you poor E7 son of a bitch. Now, go get 'em!"

ERIN PETERSEN: Mmm.

JAMES MCCLURE: Ahhh! That was terrifying!

ERIN PETERSEN: Goodness.

JAMES MCCLURE: So I had another little -- Ma'am, I had another little drink of scotch.

ERIN PETERSEN: Okay.

JAMES MCCLURE: Put all the switches up. Turned all the knobs to the right. Push all the levers all the way forward. U.S.S. Barque Road[1] is ready for combat.

ERIN PETERSEN: Okay.

JAMES MCCLURE: And so is Navy 902 circling overhead. And them 30-caliber mini guns, they're so heavy my wings are tipping down. And when I blast, there's nothing left.

I'll take out that filbert or walnut farm, his wife, his kids. And you know what? I'll feel no sorrow tomorrow.

ERIN PETERSEN: You would –

JAMES MCCLURE: Because the admiral told me to do it.

ERIN PETERSEN: Okay.

JAMES MCCLURE: And I love it! That's why I got 31 years, six months and 17 days as an E7.

ERIN PETERSEN: Okay.

JAMES MCCLURE: Yeah. Because they just send me the shit like this.

ERIN PETERSEN: Oh.

JAMES MCCLURE: I think they (indiscernible). Because I'm a Cherokee outlaw. They look through the windows to see if they can find me my buffalo graves.

5/14/13 RP 74, 104-09; Ex. 4. The call lasted approximately ten minutes during which Mr. McClure also discussed his military service in Viet Nam, the Cherokee Nation, and the Bureau of Indian Affairs.[2] 5/14/13 RP 91, 96.

Ms. Peterson was not alarmed by Mr. McClure's statements. 5/15/13 RP 252. Lieutenant Hawley did not become aware of the conversation until the following week, when he listened to recordings of Mr. McClure's calls as part of his harassment investigation. 5/14/13 RP

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[1] Lieutenant Hawley believed that Mr. McClure lived on Barque Road.

[2] The conversation was played in its entirety for the jury. A transcript of the full conversation is attached as Appendix B.

74, 83. He interpreted Mr. McClure's statements as a threat to his family and home. 5/14/13 RP 75.

Mr. McClure was charged with harassment by a threat to kill Lieutenant Hawley's wife, M'liss Rae Hawley, in violation of RCW 9A.46.020(1) and (2).[3] CP 54-55. Immediately prior to voir dire, and without explanation or elaboration, the court informed the parties that two potential jurors were already excused. 5/14/13 RP 30.

> Let me tell you on Page 1 of your juror sheet the ones that are not here. I've drawn a line through 2, 4, 5, 10, 15, 16, 19, 24, 33, 37, 41, 42, and 44.
>
> That's 13 no-shows or excused. There were two excuses but the rest were no-shows.
>
> So that's what we have to work with.

5/14/13 RP 30. Mr. McClure was convicted. CP 24.

On appeal, Mr. McClure argued the unexplained excusal of two jurors behind closed doors violated the right to an open and public trial and his right to be present. He also argued there was insufficient evidence to prove beyond a reasonable doubt that he made a true threat or that Ms. Hawley's reasonably feared he would kill her. Br. of App. at 14-22. The Court of Appeals disagreed and affirmed the conviction. The court ruled Mr. McClure did not "demonstrate a courtroom closure or trial court error related to the administrative juror excusals." Opinion at 8. The court also

[3] Mr. McClure was also charged with telephone harassment of Erin Petersen, in violation of RCW 9.61.230(1), but he was acquitted by the jury. CP 25, 55.

ruled the State presented sufficient evidence to establish Mr. McClure's statements constituted a "true threat" and Ms. Hawley reasonably feared Mr. McClure would carry out his threat to kill her. Opinion at 9-11.

E. ARGUMENT

1. The decision of the Court of Appeals that Mr. McClure's right to an open and public trial and his right to be present conflicts with jurisprudence regarding closed courtrooms and procedures conducted outside the presence of a defendant.

The federal and state constitutions guarantee the public and a defendant the right to open and public trials and further guarantee a defendant the right to be present at all critical stages of a trial. U.S. Const. amend. VI, XIV; Wash. Const. art I, §§ 10, 22; *Presley v. Georgia*, 558 U.S. 209, 212, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010); *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Lormor*, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011); *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). These rights extend to jury selection. *Presley*, 558 U.S. at 212; *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012); *Irby*, 170 Wn.2d at 883.

In violation of these rights, two potential jurors were excused from jury service behind closed doors and without explanation. 5/14/13 RP 30. The Court of Appeals characterized the excusals as administrative. Opinion at 8. This is pure speculation. A trial court *must* disqualify a juror

who does not meet the basic statutory qualifications or who the court deems unfit to serve. RCW 2.26.070, 2.26.110. A court *may* excuse a juror who demonstrates undue hardship, extreme inconvenience, public necessity, or any other reason deemed sufficient by the court. RCW 2.26.100(1). In addition, a court may delegate to court staff and clerks the authority to disqualify or excuse a potential juror from service. GR 28; *State v. Rice*, 120 Wn.2d 549, 559-62, 844 P.2d 416 (1993). Here, however, the record does not indicate who excused the jurors, when they were excused, why they were excused, whether they had been placed under oath, whether they had been informed of the charges, whether they had filled out a questionnaire, or even whether Mr. McClure was offered an opportunity to question them. On this scant record, the court's characterization is unfounded.

In *State v. Tingdale*, the court clerk excused three jurors prior to voir dire on the grounds they were acquainted with the defendant, in accordance with the court's policy. 117 Wn.2d 595, 597-98, 817 P.2d (1991). This Court ruled the policy violated the defendant's right to a randomly selected, impartial jury. "[T]he practice allows the judge, and even the clerk, to assemble a jury panel of their own choosing. This practice violates the statutorily required element of chance and calls into doubt the impartiality of the jury selected." *Id.* at 601.

The Court of Appeals did not refer to *Tingdale*. Rather, the court noted this issue is "essentially identical" to that raised in *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013). Opinion at 6. The factual circumstances, however, differ significantly. In *Wilson*, the bailiff excused two jurors prior to voir dire due to illness and rescheduled their jury service, in accordance with the court's written policy, and the court offered to bring the excused jurors into the courtroom for voir dire in the defendant's presence. *Id.* at 332. Under those circumstances, the Court of Appeals ruled the excusals did not violate the defendant's public trial right because the excusals were "a preliminary administrative component of the jury selection process" that did not implicate the public trial right. *Id.* at 340.

By contrast here, the record is completely devoid of details regarding excusal of the two jurors. The only fact to be gleaned from the record is that two jurors were excused behind closed doors.

The Court of Appeals ruled Mr. McClure did not provide a record to establish the courtroom was closed. Opinion at 8. The court relied on *State v. Koss*, in which the jury submitted two written questions during deliberations and the court provided responses written on the same paper as each of the questions, but the record did not indicate the procedure by which the court responded to the questions. __ Wn.2d __, 334 P.3d 1042,

1044-45 (2014). Without a record, this Court ruled the petitioner did not establish a courtroom closure occurred. *Id.* at 1047. By contrast, here, the trial court informed the parties on the record that the two jurors were excused prior to voir dire.

The Court of Appeals ruling ignores this Court's decision in *Tingdale*, misapplies this Court's recent decision in *Koss*, raises a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest that should be determined by this Court regarding the right to an open courtroom and to be present. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should accept review.

2. The decision of the Court of Appeals that Mr. McClure's statements constituted a "true threat" conflicts with First Amendment jurisprudence.

A threat is pure speech. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). The United States Constitution and the Washington Constitution guarantee freedom of speech. U.S. Const. amend. I; Wash. Const. art. 1, § 5; *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To comport with the constitutional right to free speech, a statute that criminalizes pure speech must be limited to unprotected speech only, such as "true threats." *Watts v. United States*, 394 U.S. 705, 707, 89

S. Ct. 1399, 22 L.Ed.2d 664 (1969); *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013).

Not all threats are "true threats." *Watts*, 394 U.S. at 707. In Washington, courts adhere to an objective speaker-based test for a "true threat."

> 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. A true threat is a serious one, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

State v. Kilburn, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004) (internal citations and quotations omitted); *accord Allen*, 176 Wn.2d at 626. Thus, in this jurisdiction, statements that "bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole," are not true threats. *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

It may noted, the Ninth Circuit and several other jurisdictions adhere to a subjective speaker-based test for a "true threat" that requires proof the speaker subjectively intended his or her statement to threaten the victim. *See, e.g., United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) ("speech may be deemed unprotected by the First Amendment as a 'true threat only upon proof that the speaker subjectively intended the speech as

a threat"). The split among jurisdictions regarding the objective or subjective test is currently under consideration by the United States Supreme Court. In *Elonis v. United States*, __ U.S. __, 134 S.Ct. 2819, __ L.Ed.2d __ (2014) (argued December 1, 2014), the Court accepted review of the question:

> Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

Here, in context and under the circumstances, Mr. McClure's statements were no more than idle talk and hyperbole and a reasonable person would not foresee his statements would be taken as a serious express of intent to kill Ms. Hawley. He had a history of repeated long and disjointed conversations with dispatchers, especially with Ms. Petersen, which were frequently crude and inappropriate. His reference to the Hawleys was very enigmatic and involved only a short portion of a rambling conversation that lasted ten minutes. 5/14/13 RP 91, 96. In fact, Ms. Petersen, whose job necessitates accurately assessing and routing calls to the fire department, medics, or police, as needed, did not single out Mr. McClure's statements for special consideration. 5/14/13 RP 88; 5/15/13

RP 181-82, 252-54. Rather, she included the recording of the conversation with other recordings to assist Lieutenant Hawley in his harassment investigation. 5/14/13 RP 88.

In *Kilburn*, the juvenile defendant told a classmate that he was going to bring a gun to school the next day and shoot everyone, starting with the classmate. 151 Wn.2d at 52. He then giggled and stated maybe he would not shoot her first. *Id.* The classmate testified that she was unsure whether the defendant was serious, she was surprised but not alarmed, they had an amiable relationship, and the defendant had a history of making jokes with classmates. *Id.* at 52-53. Under these circumstances, this Court ruled there was insufficient evidence the defendant made a true threat. *Id.* at 53. Similarly here, Mr. McClure laughed at times during the conversation, the dispatcher was not alarmed, and Mr. McClure had a history of rambling, disjointed conversations with the dispatcher. 5/14/13 RP 111, 112.

The Court of Appeals ruled the menace of Mr. McClure's statements was "underscored" by references to his military service and to the Hawleys' residence. Opinion at 10. The court cited to *State v. Locke*, in which the defendant sent three e-mails over a four-minute period of time to Governor Gregoire's government web site. 175 Wn. App. 779, 785-86, 307 P.3d 771 (2013). In the first e-mail, the defendant identified

his city as "Gregoiremustdie," and wrote that he hoped she would see a family member raped and murdered by a sexual predator, and that she had put the state "in the toilet." *Id.* at 785. In the second e-mail, the defendant again identified his city as "Gregoiremustdie," and wrote that she was a "fucking cunt," and she should be burned at the stake. *Id.* In the third e-mail, the defendant requested permission for his organization called "Gregoire Must DIe" to hold an event at the Governor's mansion, he described the event as "Gregoire's public execution," he invited the Governor to be the event "honoree," the event would last 15 minutes, the media would be invited, and the event would be attended by more than 150 people. *Id.* at 786. The court ruled that the first e-mail was crude, hyperbolic political speech and the second e-mail, standing alone, also was not a true threat. *Id.* at 791. However, the second e-mail and the third e-mail, considered together, did constitute a true threat because "[t]he menace of the communication was ... heightened by its specificity," the defendant "had no preexisting relationship or communication with the Governor from which he might have an expectation that she would not take his statements seriously," and the statements were made only days after a highly publicized shooting of a politician. *Id.* at 792-93. Here, however, Mr. McClure's references to the Hawleys were just part of a single call which, in turn, was part of a series of calls he placed in one

night. Mr. McClure had a preexisting relationship with Ms. Petersen, his purportedly threatening statements were only part of a longer conversation, and the statements did not coincide with any publicized attack on a law enforcement officer. The court's comparison of the present case to *Locke* is inapt.

The Court of Appeals ruling is contrary to this Court's decisions regarding idle talk or hyperbole, misapplies *Locke*, raises a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest that should be determined by this Court regarding the right to an open courtroom and the right to be present. Pursuant to RAP 13.4(b)(1), (2), (3), and (4), this Court should accept review.

3. Even under the deferential standard of review, the decision of the Court of Appeals that sufficient evidence was presented to establish Ms. Hawley was placed in reasonable fear that Mr. McClure would kill her is unsupported by the record.

Due process requires the State to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). An essential element of harassment by a threat to kill is the alleged victim's reasonable fear that the threat to kill will be carried out. RCW 9A.46.020(2)(b); *State v. Mills*, 154 Wn.2d 1,

10-11, 109 P.3d 415 (2005); *State v. J.M.*, 144 Wn.2d 472, 488, 28 P.3d 720 (2001).

Here, neither testified they feared Mr. McClure would actually kill Ms. Hawley. Rather, they feared Mr. McClure would do "something" that would harm them or their property. 5/14/13 RP 97, 114, 128. Ms. Hawley testified that her husband told her that 911 received a call in which their lives and the lives of their children was threatened, and the caller knew where they lived, harassed a dispatcher, and left a package at the dispatch center that was mistakenly assumed to be a bomb. 5/14/13 RP 124-26, 134-35. According to Ms. Hawley, her husband characterized the call as a "very serious threat," he said "it was very credible that this person was capable of doing what he said he was going to do," and she was "very concerned" for her safety." 5/14/13 RP 127. "[H]e wouldn't want me to worry about something unless it was extremely serious and very *possible for this individual to do something.*" 5/14/13 RP 128 (emphasis added). One week before trial, Lieutenant and Ms. Hawley met with the prosecutor and she learned more details about Mr. McClure, specifically, the confiscation of his guns four years earlier and his presumed alcohol use, which made her more nervous, and she applied for a concealed weapons permit. 5/14/13 RP 130, 132.

Lieutenant Hawley testified that he interpreted Mr. McClure's phrase "smoking hole" to mean "blow someone away," and his reference to "Black Ops helicopter" and "mini .30 caliber machine guns" meant he was going to "blast my place apart and kill everyone." 5/14/13 RP 75, 106. He took the statements seriously because his wife worked out of their home, and he believed Mr. McClure must have taken some steps to learn where he lived, Mr. McClure seemed to be "spiraling out of control," and he was "going mobile", that is, he was frequently away from home. 5/14/13 RP 76, 79. Regardless of Lieutenant Hawley's interpretation of Mr. McClure's phraseology, however, he testified, "Again, he's making a threat. *I – who knows? He could show up at our front door with a package. I don't know. But, again, he has a history of – doing odd things. He's actually assaulted a police officer once.*" 5/14/13 RP 97 (emphasis added). He further testified, "And *I believe his intent was at some point he would come out and do something – I'm not sure what – but something that would harm our family and property.*" 5/14/13 RP 114 (emphasis added).

In *State v. C.G.*, the juvenile defendant was convicted of harassment by threats to kill based on her statement, "I'll kill you, Mr. Haney, I'll kill you," while she was being disciplined by the school vice principal. 150 Wn.2d 604, 606-07, 80 P.3d 594 (2003). The vice principal

testified that the purported threat made him concerned that C.G. might try to harm him or someone else in the future. *Id.* at 607. On appeal, her conviction was reversed on the grounds that there was no evidence the vice principal was placed in reasonable fear C.G. would actually kill him. *Id.* at 610. Similarly here, the State established Ms. Hawley was concerned Mr. McClure might do "something," an unspecified act, but the State did not prove that she was placed in reasonable fear Mr. McClure would actually kill her, regardless of his phraseology.

Without reference to *C.G.* or other authority, the Court of Appeals simply concluded the evidence "more than establishes a suspicion he might do 'something.' Implicit in Ms. Hawley's words and actions is her belief that McClure had threatened to kill her." Opinion at 11. Yet, as this Court recognized in C.G., a fear of "something" is not synonymous with a fear of being killed.

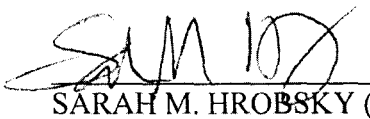
The Court of Appeals ruling is contrary to this Court's decisions regarding the sufficiency of evidence to establish a reasonable fear of being killed, raises a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest that should be determined by this Court regarding the right to an open courtroom and the right to be present. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should accept review.

F. CONCLUSION

The decision of the Court of Appeals is in violation of the right to an open courtroom, the right to be present, the right to free speech, and the right to due process as protected by the federal and state constitutions. For the foregoing reasons, Mr. McClure respectfully requests this Court accept review of the Court of Appeals decision in this case.

DATED this 15th day of December, 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES MICHAEL MCCLURE, Appellant.	)	No. 70516-4-I DIVISION ONE UNPUBLISHED OPINION FILED: November 17, 2014

APPELWICK, J. — A jury found McClure guilty of felony harassment. McClure fails to demonstrate that excusal of two jurors prior to presenting the venire for voir dire violated his public trial right or right to be present at all critical proceedings. We also conclude that the evidence was sufficient to establish a "true threat" to kill and the victim's reasonable belief that McClure would carry out his threat. We affirm.

FACTS

Between December 2012 and January 2013, James McClure called the Island County 911 dispatch center more than 100 times, sometimes up to 15 times per night. Each call lasted at least 6 to 7 minutes, and McClure frequently asked to talk to dispatcher Erin Peterson. McClure never reported any emergencies, but generally talked about his years of service in the Navy, his wife, and poker. McClure's conversations were occasionally rambling and vulgar, and he sometimes sounded intoxicated.

On December 28, 2012, McClure delivered a suspicious package to the dispatch center addressed to Peterson. The bomb squad responded and determined that the package contained playing cards, a book about poker, and some written notes.

Based on the package incident and McClure's continuing calls, Island County Sheriff's Lieutenant Mike Hawley began an investigation. Lt. Hawley attempted to contact McClure several times, but he was not home. On January 6, 2013, Hawley spoke with McClure by telephone and threatened him with arrest if he did not stop the calls.

Immediately after the conversation with Hawley, McClure placed another series of calls to the dispatch center. In one of the calls, McClure had the following conversation with the dispatcher:

> JAMES McCLURE: This is a message for whoever the senior bastard is, you have a Hawley that used to be sheriff.
>
> ERIN PETERSEN: Okay.
>
> JAMES McCLURE: I had to sign a letter that said I would not talk about, discuss or release any press releases for 20 years after I got out of the Navy. And I got out of the Navy on the 31st of May, 1993. But due to Internet technology and everything else, it's leaking out.
>
> So I'm kind of fuzzy a little bit. So I cleared it with three Navy captains and an admiral.
>
> . . . .
>
> ERIN PETERSEN: Okay.
>
> JAMES McCLURE: Lives right here on Whidbey Island. They're all retired.
>
> ERIN PETERSEN: So you're [sic] weren't supposed to do -- You weren't supposed to talk about what? I'm sorry.
>
> . . . .
>
> JAMES McCLURE: Everything I did in the Navy.
>
> ERIN PETERSEN: Okay.

JAMES McCLURE: Okay. And my Navy references are: VO-67, Albadron-67 (phonetic), VAH-21, Heavy 21.

ERIN PETERSEN: Mm-hmm.

JAMES McCLURE: And I had an Ace of Diamonds and a Queen of Spades painted on my tail. Yes, ma'am. I put 'em up there myself.

ERIN PETERSEN: Mm-hmm.

JAMES McCLURE: Pretty thing. Pretty thing. Gun ships, ma'am. Gun ships.

And after I talked to captain -- Well, I talked to the Master Chief first. He's here, too. He talked with Captain. Captain called me. Captain called the Admiral. Admiral approved it.

He says, "Forget about that last five months, Chief. Go ahead and let him have it."

ERIN PETERSEN: Okay.

JAMES McCLURE: You know what the Admiral wants to see happen to Mike Hawley?

ERIN PETERSEN: Oh. I don't know.

JAMES McCLURE: Smoking hole (indiscernible).

. . . .

JAMES McCLURE: I don't know what he did to piss the admiral off, but the admiral said, "Chief, you're flying tonight in a black airplane. We're all going to bed with their wives, you poor E7 son of a bitch. Now, go get 'em!"

. . . .

ERIN PETERSEN: Mmm.

JAMES McCLURE: Ahhh! That was terrifying!

ERIN PETERSEN: Goodness.

JAMES McCLURE: So I had another little -- Ma'am, I had another little drink of scotch.

ERIN PETERSEN: Okay.

JAMES McCLURE: Put all the switches up. Turned all the knobs to the right. Push all the levers all the way forward.

. . . .

JAMES McCLURE: U.S.S. Barque Road I is ready for combat.

. . . .

ERIN PETERSEN: Okay.

JAMES McCLURE: And so is Navy 902 circling overhead. And them 30-caliber mini guns, they're so heavy my wings are tipping down. And when I blast, there's nothing left.

I'll take out that filbert or walnut farm, his wife, his kids. And you know what? I'll feel no sorrow tomorrow.

ERIN PETERSEN : You would -

JAMES McCLURE: Because the admiral told me to do it.

ERIN PETERSEN: Okay.

JAMES McCLURE: And I love it! That's why I got 31 years, six months and 17 days as an E7.

. . . .

ERIN PETERSEN: Okay.

JAMES McCLURE: Yeah. Because they just send me the shit like this.

ERIN PETERSEN: Oh.

JAMES McCLURE: I think they (indiscernible). Because I'm a Cherokee outlaw. They look through the windows to see if they can find me my buffalo graves.

Hawley lived with his wife M'Liss Hawley on a five acre farm with an orchard of filberts and walnuts. The property is not open to the public. Upon learning of the personal references in McClure's call, Hawley alerted his wife to the threats.

Hawley investigated a similar series of calls that McClure placed to the dispatch center in 2008. Hawley and other officers repeatedly contacted McClure at his house in an unsuccessful effort to persuade him to stop the calls. During the 2008 incidents, McClure was arrested for brandishing a flare gun in a local attorney's office. Another attorney obtained a protection order against McClure for threatening and harassing calls. Based on the protection order, Hawley removed 6-12 firearms from McClure's house.

Lt. Hawley took McClure's threats seriously. He knew that McClure "had gone mobile [and] was out driving all the time." He believed that McClure was unpredictable and dangerous and could be "spiraling out of control." Based on the information supplied by her husband, Ms. Hawley believed the threat was serious and credible.

The State charged McClure with one count of felony harassment, threat to kill, involving Ms. Hawley and one count of telephone harassment involving Erin Peterson. Prior to commencement of voir dire in the courtroom, the trial judge informed the parties that 11 potential jurors had failed to appear and 2 had been excused.

The jury found McClure guilty as charged of felony harassment, threat to kill, and not guilty of telephone harassment. The court imposed a three month standard range term.

DECISION

McClure contends that his right to a public trial was violated when two jurors were excused outside of the courtroom before voir dire. He also maintains that he had a constitutional right to be present at the excusal proceeding.

A criminal defendant has a right to a public trial under both the state and federal constitutions. State v. Lormor, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011); see U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. But "'[n]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.'" State v. Koss, ___ Wn.2d ___, 334 P.3d 1042, 1045 (2014) (quoting State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012)). Before determining whether a public trial violation occurred, an appellate court first considers "whether the proceeding at issue was one to which the constitutional right to a public trial attaches." Id.

The court addressed an essentially identical issue in State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013). In Wilson, the bailiff excused two jurors for illness before voir dire began in the courtroom. Id. at 332. The excusal was in accordance with the trial court's written policy, which allowed administrative staff "to excuse jurors pretrial for illness-related reasons, and rescheduled them for jury service at a later date." Id. On appeal, Wilson argued that the excusals violated his right to a public trial and his right to be present at all crucial proceedings. Id. at 333. After examining the claims in light of the "experience and logic" test, the court disagreed. Id. at 337.

Under the "experience" prong, the court noted that no Washington decision has held that preliminary juror excusals for hardships have historically been open to

the public. Id. at 342. Nor has a court held that the public trial right implicates any component of jury selection "that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. In general, the trial court and its delegated agents retain broad discretion to excuse jurors for administrative or hardship reasons outside of the courtroom "provided that the excusals are not the equivalent of peremptory or for cause juror challenges." Id. at 344; see also RCW 2.36.100(1); CrR 6.3; State v. Rice, 120 Wn.2d 549, 561-62, 844 P.2d 416 (1993).

Under the "logic" prong, the Wilson court found no showing that public access played "'a significant positive role'" in pre voir dire juror excusals for hardships. 174 Wn. App. at 346 (quoting Sublett, 176 Wn.2d at 73). Moreover, because the bailiff had broad discretion to excuse jury pool members for "hardship" and other reasons, openness during the pre voir dire excusal proceeding would not have "'enhance[d] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" Id. (alteration in original) (quoting Sublett, 176 Wn.2d at 75). The court concluded that the bailiff's administrative excusal of two jurors for illness did not implicate Wilson's public trial right and no courtroom closure occurred. Id. at 347.

The court also rejected Wilson's claim that he had a constitutional right to be present during such proceedings. Id. at 350. The court noted that the excusals were not based on any circumstances related to Wilson personally or to the issues in his case. Id. Moreover, there was no showing that his presence bore any "'relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the

charge'" or "'that a fair and just hearing would be thwarted by his absence.'" Id. (quoting State v. Irby, 170 Wn.2d 874, 881, 246 P.3d 796 (2011)).

Nothing in the record suggests that the excusals here were related to McClure personally or to the circumstances of his case or that they involved any error or abuse of discretion. Under Wilson, McClure fails to demonstrate that the excusals prior to the venire being presented for voir dire violated his public trial right or right to be present.

McClure contends that, unlike Wilson, the record here fails to reveal who excused the jurors, when the excusals occurred, and the reason for the excusals. Although true, these contentions are also fatal to McClure's claim of error. Generally, the trial court bears the burden of making a record demonstrating the proper procedures for closing a court proceeding to which the open trial right attaches. Koss, 334 P.3d at 1047. But the appellant "bears the responsibility to provide a record showing that such a closure occurred in the first place." Id. (appellant failed to show that courtroom closure occurred during proceedings related to jury questions). The trial court informed the parties before voir dire began that there were 11 "no-shows" and "two excuses." McClure did not object or request any further explanation. Under the circumstances, he cannot demonstrate a courtroom closure or trial court error related to the administrative juror excusals.

McClure also contends the evidence was insufficient to support his harassment conviction. He argues that a reasonable person in McClure's position would not foresee that such enigmatic remarks would be interpreted as a serious expression of an intent to kill Ms. Hawley and that the State therefore failed to prove

a "true threat." He also claims that the evidence failed to establish that Ms. Hawley reasonably feared he would carry out the threat to kill her. Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In order to convict McClure of harassment as charged, the State was required to prove, among other things, that he knowingly threatened to kill Ms. Hawley and that his words placed her "in reasonable fear that the threat to kill would be carried out." See RCW 9A.46.020(1), (2). To avoid violating the First Amendment, a statute criminalizing threatening language must also be construed "as proscribing only unprotected true threats." State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). Here, the trial court instructed the jury that

> [t]o be a threat, a statement or act must occur in a context or under such circumstances 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.

Even if couched in the language of threats, communications are not true threats if they are in fact "merely jokes, idle talk, or hyperbole." State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The existence of a true threat does not depend on the subjective intent of the speaker. See State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). "It is enough that a reasonable speaker would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283.

Immediately after Lt. Hawley told him that he would be arrested if he placed any more unnecessary calls to the dispatch center, McClure called the center with "a

message for whoever the senior bastard is, you have a Hawley that used to be sheriff." He referenced his past service on Navy "gun ships" and then told the dispatcher that "the Admiral" wanted "Mike Hawley" to become a "smoking hole" and said, "Now, go get 'em." McClure, who lived on Barque Road, then announced that the "U.S.S. Barque Road is ready for combat" and "when I blast, there's nothing left." "I'll take out that filbert or walnut farm, his wife, his kids. And you know what? I'll feel no sorrow tomorrow."

McClure underscored his intention and threats to blast a "smoking hole" and to "take out" Hawley's farm and family through specific references to Hawley, to the location of Hawley's personal residence, to private details of Hawley's residence and property, and to his military service. See State v. Locke, 175 Wn. App. 779, 793, 307 P.3d 771 (2013) ("menace of the communication . . . further heightened by its specificity"), review denied, ___ Wn.2d ___, ___ P.3d ___ (2014). McClure had no preexisting amicable relationship or communications with the Hawleys from which he could reasonably expect that they would not take his statements seriously. See Kilburn, 151 Wn.2d at 39. When Lt. Hawley investigated a similar series of calls in 2008, he had removed firearms from McClure's home. McClure had recently resumed the calls and appeared to be escalating his conduct.

Under the circumstances, a reasonable person in McClure's position would foresee that his statements would be interpreted as a serious expression of an intent to carry out the threat. The evidence was sufficient to establish a true threat.

McClure's communication also encompassed a specific threat to "take out" Lt. Hawley's wife. Ms. Hawley testified that she was away from the house on a business

trip when her husband called and told her "that my life and his life and our children's li[ves were] threatened." This was the first time he had informed her about a specific threat to her life. She recognized that her husband believed the threat was "very serious" and "credible," and she became very upset. Lt. Hawley also told her about McClure's frequent calls to the dispatch center, the suspicious package that he left, and his personal reference to the family's nut farm. Upon returning home, she immediately took additional safety precautions, including no longer taking walks outside in the field or walking the dogs in the orchard. She also obtained a concealed weapons permit.

Contrary to McClure's suggestion, the evidence establishes more than a suspicion that he might do "something." Implicit in Ms. Hawley's words and actions is her belief that McClure had threatened to kill her. Viewed in the light most favorable to the State, the evidence was sufficient to establish that she reasonably believed he would carry out this threat.

Affirmed.

Cuppelwick, J.

WE CONCUR:

Leach, J.

Schindler, J.

APPENDIX B

MR. CARMAN: Your Honor, at this time the State would move to admit State's Exhibit 4.

MR. SIMPSON: No objection.

THE COURT: State's Exhibit 4 is admitted.

MR. CARMAN: Your Honor, the State would move to publish.

THE COURT: Go ahead.

MR. CARMAN: Okay.

(State's Exhibit 4, CD, played for the jury.)

JAMES McCLURE: "This is a message for whoever the senior bastard is, you have a Hawley that used to be sheriff."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "I had to sign a letter that said I would not talk about, discuss or release any press releases for 20 years after I got out of the Navy. And I got out of the Navy on the 31st of May, 1993. But due to Internet technology and everything else, it's leaking out.

"So I'm kind of fuzzy a little bit. So I cleared it with three Navy captains and an admiral."

Q (By Mr. Carman) Lieutenant Hawley, can you hear that recording?

A Yes.

Q Are you able to recognize the male voice that's on

that recording?

A That's Mr. McClure.

(State's Exhibit 4, CD, played for the jury.)

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Lives right here on Whidbey Island. They're all retired."

ERIN PETERSEN: "So you weren't supposed to do-- You're weren't supposed to talk about what? I'm sorry."

Q (By Mr. Carman) Can you recognize that female voice?

A Yes, that's the dispatcher. Erin Petersen.

Q And are you able to discern what Mr. McClure is saying?

Is the recording clear enough?

A Yes.

(State's Exhibit 4, CD, played for the jury.)

JAMES McCLURE: "Everything I did in the Navy."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Okay. And my Navy references are: VO-67, Albadron-67 (phonetic), VAH-21, Heavy 21."

ERIN PETERSEN: "Mm-hmm."

JAMES McCLURE: "And I had an Ace of Diamonds and a Queen of Spades painted on my tail. Yes, ma'am. I put 'em up there myself."

ERIN PETERSEN: "Mm-hmm."

JAMES McCLURE: "Pretty thing. Pretty thing.

"Gun ships, ma'am. Gun ships.

"And after I talked to captain-- Well, I talked to the Master Chief first. He's here, too. He talked with Captain. Captain called me. Captain called the Admiral. Admiral approved it.

"He says, 'Forget about that last five months, Chief. Go ahead and let him have it.'"

ERIN PETERSEN: "Okay."

JAMES McCLURE: "You know what the Admiral wants to see happen to Mike Hawley?"

ERIN PETERSEN: "Oh. I don't know."

JAMES McCLURE: "Smoking hole (indiscernible)."

Q (By Mr. Carman) Is that the threat you described?

A That's the first one, yes.

Q What does the term, "smoking hole," mean to you?

A Blow someone away.

(State's Exhibit 4, CD, played for the jury.)

JAMES McCLURE: "I don't know what he did to piss the admiral off, but the admiral said, 'Chief, you're flying tonight in a black airplane. We're all going to bed with their wives, you poor E7 son of a bitch. Now, go get 'em!"

Q (By Mr. Carman) What does a "black airplane" mean to you?

A It could be it's like an undercover type of

operation. Something like that.

Q Is this one of the metaphors that you talked about?

A Correct.

(State's Exhibit 4, CD, played for the jury.)

ERIN PETERSEN: "Mmm."

JAMES McCLURE: "Ahhh! That was terrifying!"

ERIN PETERSEN: "Goodness."

JAMES McCLURE: "So I had another little-- Ma'am, I had another little drink of scotch."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Put all the switches up. Turned all the knobs to the right. Push all the levers all the way forward."

Q (By Mr. Carman) Do you know what it means to put all the switches up, turn all the knobs to the right, and push all the levers all the way forward?

A It sounds like he's preparing to take off in a - in a, you know, an airplane or something like that.

Q Lieutenant Hawley, do you know where Mr. McClure lives at this time?

A Off of West Beach Road on Barque Street.

Q Barque Street?

(State's Exhibit 4, CD, played for the jury.)

JAMES McCLURE: "U.S.S. Barque Road is ready for combat."

Q (By Mr. Carman) Barque Street or Barque Road?
A Barque Road.
(State's Exhibit 4, CD, played for the jury.)
ERIN PETERSEN: "Okay."
JAMES McCLURE: "And so is Navy 902 circling overhead. And them 30-caliber mini guns, they're so heavy my wings are tipping down. And when I blast, there's nothing left.
I'll take out that filbert or walnut farm, his wife, his kids. And you know what? I'll feel no sorrow tomorrow.
ERIN PETERSEN: "You would" --
JAMES McCLURE: "Because the admiral told me to do it."
ERIN PETERSEN: "Okay."
JAMES McCLURE: "And I love it! That's why I got 31 years, six months and 17 days as an E7."
Q (By Mr. Carman) What kind of farm do you live on?
A Hazelnut, filbert farm, walnuts.
(State's Exhibit 4, CD, played for the jury.)
ERIN PETERSEN: "Okay."
JAMES McCLURE: "Yeah. Because they just send me the shit like this."
ERIN PETERSEN: "Oh.
JAMES McCLURE: "I think they (indiscernible).

Because I'm a Cherokee outlaw. They look through the windows to see if they can find me my buffalo graves."

ERIN PETERSEN: "Uh-huh."

JAMES McCLURE: "Yeah. The Vietnamese didn't like me at all. Black pajamas were history." (Laughing.)

ERIN PETERSEN: (Indiscernible..."a minute.

JAMES McCLURE: "I blew 'em all away." (Indiscernible.)

"But around Christmastime it always bothered me. You know, we lost three crews in just less than ten days."

ERIN PETERSEN: (Indiscernible.)

JAMES McCLURE: "Less than ten days. Dillard (phonetic), Jesus and Ogden (phonetic), their little bones and shit are all in one hole (indiscernible).

"Never mind. You wouldn't care. They all had families. They all had kids."

ERIN PETERSEN: "Mm-hmm."

JAMES McCLURE: "Pretty sad."

ERIN PETERSEN: "'kay.

JAMES McCLURE: "So when ya' celebrate the New Year, dance to Creedence Clearwater Revival and listen to those words."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Yeah. And think about that. That's a classic song. John Fogerty wrote it after he

talked to me --

ERIN PETERSEN: "Mm-hmm."

JAMES McCLURE: -- in 1975."

ERIN PETERSEN: "Hmm."

JAMES McCLURE: "Mm-hmm. Yes, ma'am. Yes, ma'am. Yes, ma'am. Yes, ma'am."

ERIN PETERSEN: "Well, I have" --

JAMES McCLURE: "And wear skinny panties. And if your husband is in the Navy, that's probably what he's fighting for."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "And me and my wife's been married for 49 years coming up. And if you ever meet her, she's not as mean as she looks."

ERIN PETERSEN: "Okay. Jimmy --"

JAMES McCLURE: "Yes, ma'am."

ERIN PETERSEN: "-- I'm going to have to hang up. But I --

JAMES McCLURE: "Oh, yeah. Any time when you're talking to Jimmy, I can understand (indiscernible). I can understand this-- I can understand all the circuits are busy.

"My wife can understand, 'Your husband was killed at night.'"

"She goes, 'Oh, fuck you.'"

ERIN PETERSEN: (Chuckles.)

JAMES McCLURE: (Laughs.)

"And he goes, 'What did you say?'"

"She says, 'Fuck you.'"

"And then he goes, 'I can't believe that. Well, yeah. That's unbelievable. Unbelievable!"

"UFB! If my husband was killed at night, he would have called me and told me about it!"

(Laughing.)

ERIN PETERSEN: "Well, have a good night. Okay?"

JAMES McCLURE: "All nights are good when you get to be my age."

ERIN PETERSEN: "That's right."

JAMES McCLURE: "MiGs. They're all around us. They're all around us. Greathouse (phonetic) shot down a MiG with a goddam AD (phonetic)in 1942 model Navy airplane. Shot down a jet in 1967. He flew for the (indiscernible)."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Yeah. Greathouse (phonetic). Yeah. We got Lundstrom (phonetic). You got Brian Too-tall(phonetic) McGinnis (phonetic).

"They're all-- Listen to Creedence!

"'When will we see the rain?'.

"Well, we've seen it. And it won't quit. Because it's winter. (Laughing.)

"I mean, it ain't real hot and it ain't real cold." (Indiscernible.)

ERIN PETERSEN: "I mean, I've got to go. I'm sorry. I going to hang up."

JAMES McCLURE: "That's fine, ma'am."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "But it's been a pleasure talking to you!"

ERIN PETERSEN: "You, too! Thanks, Jimmy.

JAMES McCLURE: "Hey! Good night, ma'am. Good night. Good night. (Indiscernible singing) 9-0-2."

ERIN PETERSEN: "Good night."

JAMES McCLURE: "We're - we're armed and dangerous." (Laughing.)

ERIN PETERSEN: "Okay. Have a good night!"

JAMES McCLURE: "Yes, ma'am."

ERIN PETERSEN: "All right."

JAMES McCLURE: "Good night."

BY MR. CARMAN:

Q So, Lieutenant Hawley, you listened to that entire tape?

A Yes.

Q And during the course of that tape he talks about

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70516-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Isand County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 15, 2014

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