Supreme Court No. 99732-2
(COA No. 36432-1-III consolidated with 37546-3-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SLOAN STANLEY,
Petitioner.

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

ANSWER/ CROSS-PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND OPINION BELOW

Sloan Stanley, petitioner, through counsel, seeks review pursuant to RAP 13.3 and RAP 13.4 of issues raised on appeal which the Court of Appeals either did not address or affirmed.

B. ISSUES PRESENTED FOR REVIEW

1. The trial court prohibited Mr. Stanley from calling the State's own informant as a witness and introducing exonerating portions of audio recordings from the State's surveillance of him, even after the State had introduced aspects of this evidence in its case-in-chief. The Court of Appeals applied well-settled case law to find that the trial court improperly excluded this relevant evidence through misapplication of the hearsay rules. Neither the State's disagreement with the Court of Appeals' well-reasoned assessment, nor its effort to defend the trial court's legally baseless rationale for excluding the evidence meet RAP 13.4(b) criteria. This Court should deny review.

2. The State's sole evidence that Mr. Stanley made any threats was based on what jail informant Randy Burleson claimed Mr. Stanley said while the two men were alone in a jail cell. Burleson testified that Mr. Stanley made threats against "three witnesses," without identifying who they were. Based on the little detail Burleson did provide, one of the allegedly threatened "witnesses" could not have been any of the four

witnesses Mr. Stanley was convicted of harassing. This Court should accept review because Mr. Stanley's convictions for harassment are not supported by sufficient evidence under this Court's caselaw, which requires the person threatened be placed in reasonable fear of the actual threat made. RAP 13.4(b)(1)&(3).

3. In violation of ER 403, Burleson gratuitously testified that Mr. Stanley concerned him more than Gary Ridgway, a notorious serial killer. The State's witnesses also read threatening e-mails from Mr. Stanley's 2015 cyberstalking conviction to the jury, which were then admitted as substantive evidence and emphasized by the prosecutor as propensity evidence in violation of ER 404(b). This Court should accept review because the court's disregard of the evidence rules is contrary to established precedent and resulted in an unfair trial. RAP 13.4(b)(1)-(4).

4. Contrary to this Court's decision in *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997), the trial court allowed the prosecutor to preemptively bolster its jail informant, Burleson, when his credibility had not been attacked and the bolstering far exceeded any anticipated credibility attack. RAP 13.4(b)(1).

5. The trial court imposed an exceptional sentence based on Mr. Stanley's words and conduct that were already accounted for in the

standard sentencing range for his conviction, contrary to this Court's caselaw and the SRA. RAP 13.4(b)(1), (4).

6. Mr. Stanley's standard range sentence of 77-102 months was increased to 402 months based on the "egregious lack of remorse" aggravator. This aggravator is void for vagueness as applied to Mr. Stanley. RAP 13.4(b)(3).

7. The aggravator "egregious lack of remorse" violates the First Amendment because it punishes constitutionally protected speech when applied to harassment, a speech crime. RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Lifelong convict Randy Burleson briefly shared a prison cell in 2016 with Sloan Stanley. RP 234. Nearly a year later, Burleson contacted the King County Prosecutor's Office through is defense attorney and alleged Mr. Stanley made threats to prior witnesses, a judge, and prosecutors when they were briefly celled together. RP 175; CP 1-2.

The State determined Burleson's "distinct lack of credibility" required additional evidence to support a criminal charge, and the State placed a vetted confidential informant in Mr. Stanley's cell as he was nearing release from prison. CP 2; RP 176, 345, 358. This informant, Billy Temple, at first claimed Mr. Stanley made threats that corroborated Burleson's claim. CP 1-4. The State charged Mr. Stanley with numerous

counts of felony harassment and one count of intimidating a judge. CP 1-4; 7-11. However, audio from the State's wiretap that Mr. Stanley fought to obtain proved Temple's claim was untrue, and Temple later admitted Mr. Stanley made no threats. RP 471.

Pre-trial, the State offered to resolve these charges through a stipulated order of continuance (SOC) that would have resulted in dismissal of the charges. 6/14/18 RP 13. Mr. Stanley rejected this offer, insisting on proving his innocence through the audio recordings and Temple's testimony. 4/2/18 RP 28; 8/20/18 RP 31.

The State amended the Information after Temple's mendacity was uncovered, but still charged five counts of felony harassment against four of the participants from Mr. Stanley's 2015 trial for cyberstalking, and King County Prosecutor, Wes Brenner, who prosecuted the case against Mr. Stanley in 2015. CP 63-65. The State also maintained one count of intimidating the judge who had presided over the 2015 trial. CP 66.

When the State removed Temple from its witness list before trial, Mr. Stanley stated his intent to call Temple as his own witness. 8/28/18 RP 35. The judge signed a material witness warrant and orders to transport Temple to testify at trial. RP 176, 453-54, 459.

Rather than addressing the new allegations, most of the State's case involved evidence from Mr. Stanley's prior cyberstalking convictions

from 2015. CP 63-65; RP 243-327; 331-338; 368-446; 486-551. Burleson provided the only evidence that Mr. Stanley made a threat in 2016. Burleson provided very little information about the content of the alleged threats other than that Mr. Stanley threatened to kill "three female witnesses, a judge and a prosecutor." RP 239. He did recall that one of the "witnesses" was the person Mr. Stanley contacted in violation of his DOSA. RP 218. This person, Jennifer Benz, was a bartender who worked with and knew the 2015 cyberstalking victims. RP 337-38, 351, 353-54, 556. Mr. Stanley was not charged with harassing Ms. Benz. CP 63-66.

The State sought to bolster Burleson's credibility on direct examination by encouraging him to state he was risking his life by testifying with no incentive from the State. RP 203-06. The State also elicited from Burleson that Mr. Stanley alarmed him more than murderers he had known, including Gary Ridgway. RP 202-06; 227-28.

After nearly five days of testimony from the State's witnesses about their fear and Mr. Stanley's past conduct, and after the detective testified about the audio contents from Temple's wiretap, the State sought to prohibit Mr. Stanley from calling Temple or introducing the State's audio in his defense. RP 347-48; 455; 460-65. Mr. Stanley offered various bases for admission of this evidence and demonstrated the centrality of this evidence to his defense. RP 460-66.

The trial court excluded Mr. Temple's testimony and the State's audio surveillance based on the State's argument that it was "self-serving hearsay," and by confusing ER 803(a)(3)—one of the many proffered bases for admission of portions of the evidence— with the excited utterance exception. RP 480, 483; Op. at 18, 25.

Mr. Stanley testified and denied making the threats. RP 601-02. He was prohibited from testifying about the content of the State's audio surveillance. RP 603-05. Mr. Stanley was convicted as charged and the court imposed an exceptional sentence of 33.5 years in prison. based on the "egregious lack of remorse" aggravator. CP 298.

The Court of Appeals reversed Mr. Stanley's convictions because the trial court applied the wrong hearsay exception to exclude "highly relevant" evidence about the State's audio surveillance that had "little or no ability to disrupt the fairness of the fact-finding process." Op. at 2, 25. The Court of Appeals rejected or did not address the additional issues raised in counsel's appellate briefing. Op. at 27-42. Mr. Stanley filed a pro se petition seeking review of various issues raised in his appeal, PRP and SAG to which the State filed an answer/cross-petition. This Court permitted appellate counsel to include in an answer to the State's cross-appeal, issues raised on appeal but not included in Mr. Stanley's pro se petition for review.

D. ARGUMENT

1. The Court of Appeals correctly applied well established caselaw to find the trial court's exclusion of highly relevant evidence violated Mr. Stanley's right to present a defense.

a. The Court of Appeals correctly found the excluded evidence was relevant.

Contrary to the State's contention, the Court of Appeals' ruling that the evidence was relevant does not conflict with any caselaw. Answ. at 11. The bar for admissibility is low—as recently restated by this Court, evidence must be "minimally relevant." *State v. Orn*, 197 Wn.2d 343, 353, 482 P.3d 913 (2021). The Court of Appeals cited numerous bases for finding this evidence was relevant, any of which meets this test. It was rebuttal evidence tending to show that Mr. Stanley never intended or planned to harm or kill the trial participants. Op. at 24. It was relevant because it was consistent with a defense witness's account of Mr. Stanley's behavior, not Burleson's, and Temple was the *State's* informant Op. at 24 (emphasis in original). The evidence was also relevant because it showed that when "Temple prodded Stanley about his 2015 trial," he made no threats. Op. at 25. This undermined Mr. Burleson's testimony and supported Mr. Stanley's defense. Op. at 25.

The Court of Appeals found the evidence was also relevant because the "State opened the door to Temple testifying" when Detective

Christiansen testified about what Mr. Temple told them that he believed bolstered Burleson's claim. Op. at 26, fn. 4. For all of these reasons, the Court of Appeals correctly found this evidence was not just minimally relevant, but "very relevant." Op. at 26.

The State does not dispute these findings. Instead the State focuses on one additional basis for relevance, which was to show Mr. Stanley's state of mind right before his release, which the Court of Appeals found was relevant to the jury's determination of whether the victims' fear was reasonable. Op. at 25. The State tries to convince this Court that finding the evidence relevant on this basis merits review, but this claim fails for numerous reasons. Answ. at 11. As argued by Mr. Stanley on appeal, evidence obtained by the State days before Mr. Stanley's release date was relevant to harassment's element of knowingly threatening to cause bodily injury "immediately or in the future to the person threatened." RCW 9A.46.020(1)(a)(i); RP 479; Amend Br. of App. 17-18.

The State claims the victims need only have "believed he would make good" on the claimed threat. Answ. at 11. However, Burleson claimed Mr. Stanley made the alleged threat while incarcerated. The only harm Mr. Stanley could intend under those circumstances is "in the future;" thus his intent immediately prior to his release was highly relevant

to the State's allegations and whether the victims' fear the threat would be carried out was reasonable. RCW 9A.46.020(1)(a)(i), 1(b), (2)(b)(ii).

The State tries to make much of the fact that Mr. Stanley did not cross-examine the witnesses about the evidence related to Temple. Answ. at 14. Mr. Stanley was not obligated to convince the witnesses at trial that the State's own evidence undercut the reasonableness of their fear. This was a question for the jury, and Mr. Stanley had a right "to control a chosen defense," which involved introducing the State's own evidence in his defense. *State v. Coristine*, 177 Wn.2d 370, 379, 300 P.3d 400 (2013).

The State also claims the evidence was not relevant because the State placed Temple and its audio surveillance in Mr. Stanley's cell nearly one year after Burleson claimed Mr. Stanley made the threats in 2016. RP 476. However, Burleson did not report these alleged threats to the State until June of 2017, nearly one year after he claimed the threats were made. CP 2. The State's own charging document includes the period when the State obtained a search warrant and put Temple and a recording device in Mr. Stanley's cell. CP 1-2.

Any of the reasons provided by the Court of Appeals establish the excluded evidence was "minimally relevant." *Orn,* 197 Wn.2d at 353.

b. The Court of Appeals opinion corrects the trial court's misapplication of the hearsay rules.

The State's argument that ER 803(a)(3) does not apply omits the fact that the Court of Appeals' citation to this rule corrects the trial court's error of "focusing on the wrong hearsay exception." Op. at 24. The trial court confused "then existing mental state" with the "excited utterance exception." RP 480, 483; Op. at 18, 24. The Court of Appeals correctly found the trial court's misunderstanding of the applicable evidence rules was an error of law, which was an abuse of discretion. Op. at 25.

The State also fails to mention that, in addition to confusing ER 803(a)(3) and ER 803(a)(2), the trial court also abused its discretion when it prohibited Mr. Stanley from presenting Temple's witness testimony and the State's audio surveillance evidence because the trial court adopted the prosecutor's mistaken argument that it was "self-serving hearsay." RP 480, 483; Op. at 18. No rule of evidence excludes "self-serving hearsay." *State v. Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011); *see also State v. King*, 71 Wn.2d 573, 577, 429 P.2d 914 (1967) ("self-serving" is a shorthand way of saying a statement is hearsay and does not fit a recognized exception to hearsay rule).

The Court of Appeals correctly held that the trial court's wholesale exclusion of evidence and testimony based on an inapplicable or non-

existent hearsay rule was an abuse of discretion. The State's claim that "reasonable minds" might disagree on the trial court's reliance on an incorrect or non-existent evidence rule is meritless. Answ. at 14.

c. The Court of Appeals correctly observed the State was unable to establish that Mr. Stanley's presentation of the State's evidence would "disrupt the trial process."

In response to the Court of Appeals' observation that the State was unable to make any showing that "the proffered evidence would disrupt the trial process," Op. 26, the State argues only that this evidence was "hearsay." Answ. at 17. This ignores the fact that the proffered evidence was not limited to Mr. Stanley's "out-of-court statements through the testimony of another." Answ. at 18. Though some of the audio surveillance contained Mr. Stanley's statements, it also contained Temple's statements, including his failed effort to encourage Mr. Stanley to make threats at the State's direction. CP 1-2; RP 471. This witness testimony and audio evidence involves both non-hearsay and potential hearsay to which ER 803(a)(3) or other exceptions would apply. However, the trial court excluded all of this evidence through misapplication of the evidence rules. The State cannot establish the excluded evidence was "so prejudicial as to disrupt the fairness of the factfinding process." *Orn*, 197 Wn.2d at 355.

d. The State fails to establish any of the RAP 13.4(b) criteria.

There is no "public interest" in defending a trial court's erroneous evidentiary rulings. Answ. at 17. And there is certainly no risk that the Court of Appeals' straightforward application of this Court's clearly articulated test for analyzing the right to present a defense will "confuse lower courts." Answ. at 19. The State fails to meet any criteria for review under RAP 13.4(b), and this Court should deny review.

2. Jail informant Burleson's vague description of threats against "three" witnesses" is insufficient to sustain conviction for four counts of harassment under this Court's caselaw, which requires proof the person threatened was placed in fear of the actual threat made.

For the offense of harassment, the State must prove "the person threatened was placed in reasonable fear of 'the threat'—the actual threat made." *State v. C.G.,* 150 Wn.2d 604, 609, 80 P.3d 594 (2003); RCW 9A.46.020(1)(a)(i), 2(b). Here there was insufficient evidence that "the threat made is the one that will be carried out" against the four witnesses the State selected as victims in counts 1-4. *Id.* at 610; CP 63-65.

The "to convict" instruction required the jury to find beyond a reasonable doubt Mr. Stanley "knowingly threated to cause bodily injury" to four specifically named people. CP 111, 116, 120, 124. Burleson's testimony was the only evidence that any threat was made. RP 363. He described the DOSA revocation as the context for Mr. Stanley's purported

ire, and that Mr. Stanley said "he wanted to kill these three girls, a judge and a prosecutor. RP 214-15 (emphasis added); *see also* 218 ("There were three witnesses…one of the women witnesses is one that they -- why they revoked his DOSA."); RP 219 ("three women witnesses"); RP 225, 239; 241 (There were three women that testified).

However, the evidence established the only "witness" Mr. Stanley contacted related to his DOSA was Jennifer Benz, who the State did not charge Mr. Stanley with harassing. RP 337-38, 353-54, 556; CP 63-65. None of the witnesses included in State's harassment charges were involved with Mr. Stanley's DOSA revocation and he had not contacted any of them after the trial in 2015. RP 351, 289, 444, 518, 548. When pressed, Burleson could only specify, "maybe one of them was a bartender and he would drink with them or something like that." RP 240-41.

Consistent with Burleson's testimony, the detective confirmed that when he interviewed him, Burleson only described three witnesses, and the detective made a mistake when he wrote down four witnesses. RP 342.

Even if this Court broadly construed a "victim" of a "threat made," the evidence would only sustain conviction against three, not four "witnesses." *C.G.*, 150 Wn.2d at 610. And where one of three "witnesses" identified by Mr. Burleson was related to the DOSA revocation, this left two unnamed witnesses who could have been the subject of the alleged

threat. However, Mr. Burleson's vague description was insufficient to establish that any of the four specific women identified in the "to convict" instruction were the "the victims" of the threat made. *Id*. at 610.

Contrary to this Court's requirements in *C.G.*, the Court of Appeals found the jury could have believed Burleson "mistakenly believed" there were three, not four witnesses. Op. at 30. This is contrary to well-established case law and the constitutional guarantee of convictions that are based on sufficient evidence. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970)*;* U.S. Const. amend. XIV; Const. art. I, § 3. This Court should accept review. RAP 13.(4)(b)(1)&(3).

3. The trial court's evidentiary rulings resulted in an unfair trial, which is a matter of public interest.

a. Burleson's testimony that Mr. Stanley was scarier than Gary Ridgway far exceeded the bounds of ER 403.

A "fair trial in a fair tribunal" is a basic element of due process. *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); U.S. Const. amend. XIV; Const. art. I, §§ 3, 21, 22. It is a matter of substantial public interest and constitutional concern when a court flouts the rules of evidence so severely that the accused is deprived of a fair trial. RAP 13.4(b)(3)-(4).

In flagrant violation of ER 403, the prosecutor asked Burleson to compare Mr. Stanley to serial killer Gary Ridgway:

> Q: Have you been locked up with folks that have been convicted of murder?
> A: Yeah, 50 and more murderers I have been locked up with. People that's done 50 -- more than 50 murders, that one person.
> Q: Who is that?
> A: Gary Ridgway, Green River killer.
> Q: How did you feel celling with him?
> A: I wasn't celled with him, but I walked the yard.
> MS. CARLSON STRAUBE: Objection, your Honor, relevancy.
> A: It was --
> THE COURT: Overruled.
> Q: Go ahead.
> A: I was a little nervous at first, just talking to the man knowing what he did. But I knew of him prior to that because of my brother knew the family. But it wasn't – I didn't have any feeling around him like I did with him [Stanley].

RP 227-28. Mr. Burleson's opinion on how a serial killer made him feel in comparison to Mr. Stanley was not relevant to any element of the offense, and served only to inflame the jury, in violation of ER 403. This affected the outcome of trial, as the prosecutor emphasized this in closing, arguing that the jury should trust Burleson, who "met the worst of the worst," including Gary Ridgway, but reminded the jury "One guy was scary. One guy made him believe that he would make good on the idle threats that you hear in prison, one guy, Sloan Stanley." RP 671. This Court should accept review to enforce meaningful boundaries on the rules of evidence in the interest of ensuring fair trials. RAP 13.4(b)(1)-(4).

b. Mr. Stanley's emails from his previous cyberstalking conviction were used as propensity evidence.

Evidence about the complaining witness's knowledge of the accused's prior violent acts may be relevant to the element of reasonable fear. *State v. Ragin,* 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999); *State v. Magers*, 164 Wn.2d 174, 182, 189 P.3d 126 (2008). However, the trial court's admission of extensive testimony and emails about Mr. Stanley's prior threats far exceeds this limited basis for admission because of the sheer volume of the prior acts evidence and because it was brazenly used as propensity evidence, contrary to the limits contemplated by this Court's caselaw. RAP 13.4(b)(1)-(2)&(4).

Over Mr. Stanley's objection, the trial court allowed the prosecutor to elicit days and days of testimony about Mr. Stanley's past conduct for which he was convicted in 2015. CP 75; 80-87; 94-96; RP 42-43, 163, 169. The witnesses not only read the most offensive and threatening of the e-mails from this case to the jury, but the court admitted them into evidence. Ex. 2-9; RP 259-65; 435-41; 497-502; 538-39; Op. at 37.

The prosecutor used this as propensity evidence, asking Judge Ramsdell if the events of the 2015 trial "made you believe that Stanley would continue his behavior even after the conviction?" The judge responded that based on Mr. Stanley's past behavior, ". . . <u>he's probably</u>

not going to change that behavior." RP 395-96 (emphasis added). Likewise, Mr. Brenner, the prosecutor in Mr. Stanley's 2015 charge stated the current allegation "sounded believable because it was similar things that he had said before in the past." RP 306.

The prosecutor asked Ms. Gray to compare past threats with the alleged threat, which she opined was "familiar" to her and "the kind of language that he used in the past and it sounded along those same lines." RP 272. The prosecutor summed it up by asking if "it sounded like the words Mr. Stanley would use?" Agreeing, Ms. Gray testified, "Sadly, that is the kind of language that I expect from him. Those are the same kinds of threats he would use towards me repeatedly." RP 272; *see also* RP 509.

In closing, the prosecutor relied on this propensity evidence to bolster Mr. Burleson's claim over defense objection, claiming the words Burleson described "sounded like Mr. Stanley. They sounded like things . . . they heard before." RP 676. The prosecutor argued the past threats corroborate the instant allegation:

> They heard in those threats many of the things they heard before and it made them afraid. Every one of them came in and told you about how those threats rang true to them and made them – gave them that reasonable fear. Mr. Burleson, if he was making up threats, could have said a lot of things, but what he said, made them reasonably afraid. You can put your confidence, when you do the analysis of Randy Burleson's credibility, like we talked about, when you look at what he said and how it was corroborated by the other witnesses.

RP 676-77 (emphasis added).

The cumulative nature of this evidence served no purpose other than to create an emotional response in the jury and bolster Burleson's claim about a threat, in violation of ER 403 and ER 404(b). This Court should accept review because this use of prior acts evidence—admitted under the guise of establishing reasonable fear— far exceeded the limited purpose for such evidence and raises a public concern about a fair trial in a fair tribunal. RAP 13.4(b)(1)-(4).

4. Contrary to this Court's caselaw, the trial court allowed the prosecutor to gratuitously bolster its jail informant.

Unless attacked, the State may not bolster a witness's testimony in direct examination. *Bourgeois,* 133 Wn.2d at 400-01. Mr. Stanley had not attacked Burleson's credibility prior to his testimony. Defense counsel reserved opening argument and Burleson was the first witness. RP 472, 201. Still, the court allowed the prosecutor ask Burleson questions designed to establish his credibility:

> Q: Why admit your guilt [in past criminal cases]?
> MS. CARLSON STRAUBE: Objection, your Honor, relevancy, again.
> MR. ERNSDORFF: That goes to his background and his credibility.
> THE COURT: Overruled.

RP 201-02. The prosecutor then elicited that Burleson was risking "life or death" by testifying in violation of the "convict code." RP 202-03.

The prosecutor preemptively elicited from Burleson that he received no benefit from testifying, and he did not ask "Detective Christiansen or me or anybody else" to "put in a good word" for him when he was sanctioned for violating his probation. RP 205. Over Mr. Stanley's objection, Burleson testified:

> A: I'm here so that I can try to protect these people that this man's threatened to kill on numerous occasions.
> Q: So you are not getting anything; right?
> A: No.

RP 205-06.

The prosecutor's effort to show Burleson was selflessly risking his life to protect the lives of others far surpasses what *Bourgeois* deemed to be impermissible questioning about witnesses' fear or reluctance to testify. 133 Wn.2d at 401. Even if an attack on Burleson's credibility regarding his prior convictions could have been anticipated, questions about the *absence* of any benefit from the State or his altruism were not anticipated attacks because they are not impeaching. This extreme crediting of the State's own witness in contrary to this Court's caselaw. RAP 13.4(b)(1).

5. This Court should accept review of the trial court's exceptional sentence that elevated a 51-102 month standard range sentence to a de facto life sentence based on facts that inhered in the offense, contrary to this Court's caselaw and the SRA.

Exceptional sentences allow punishment beyond the standard range only "where the particular offense at issue causes more damage than

that contemplated by the statute defining the offense." *State v. Davis*, 182 Wn.2d 222, 229, 340 P.3d 820 (2014); RCW 9.94A.535. An exceptional sentence may not be "based on factors inherent to the offense for which a defendant is convicted." *State v. Thomas*, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999). Criminal history accounted for in computing the offender score and may not be considered as a basis to impose an exceptional sentence. *State v. Bartlett*, 128 Wn.2d 323, 331, 907 P.2d 1196 (1995).

The offense of harassment is elevated to a felony where the defendant was previously convicted of harassment against the same victim or made threats to kill. RCW 9.94A.46.020(1), (2)(b); CP 64-65. In addition, these prior offenses are included in the offender score. Mr. Stanley's prior convictions and conduct was introduced at length to establish "reasonable fear." RCW 9A.46.020(2)(b). Mr. Stanley's prior convictions were also included in calculation of his standard range sentence. RP 163-69; CP 298. That Mr. Stanley was convicted for again harassing the same victims is accounted for in his convictions for harassment and cannot be a basis for the court to impose an exceptional sentence. RCW 9A.46.020(1)(a)(i); CP 111, 116, 120, 124.

Still the prosecutor argued the egregious lack of remorse aggravator applied to Mr. Stanley because this offense involved the same victims he was convicted of cyberstalking in 2015:

> Clearly, the threats that Mr. Stanley made from Shelton, Washington in the prison cell reflected an indifference to the harm that these women have gone through, not for a day, not for a week, not for a year, but for eight years now. Six years at the time the threats were made in Shelton. So clearly he reflected an indifference to the harm to the victims.

RP 668.

Because the conduct supporting the aggravators in counts 1-4 was accounted for in the offense and the standard range, "egregious lack of remorse" based on prior conduct was not a valid basis for the court to impose an exceptional sentence. CP 155-5, 307; RCW 9.94A.535(3)(q). This Court should accept review. RAP 13.4(b)(1)&(4).

6. This Court should grant review to decide whether the egregious lack of remorse aggravator is unconstitutionally vague and overbroad.

a. The statutory aggravator, "egregious lack of remorse" is vague as applied to Mr. Stanley.

The state and federal constitutions prohibit the deprivation of life, liberty, or property without due process. Const. art. I, § 3; U.S. Const. amend. XIV. The State violates this guarantee by taking away "someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States,* 576 U.S.

591, 595, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). These principles also apply to sentencing statutes. *Id.* at 596.

In *Johnson,* the Court applied the vagueness doctrine to the residual clause of the federal Armed Career Criminal Act (ACCA). *Id.* at 593. When applicable, this provision increased a sentence beyond the statutory maximum if the defendant had three or more convictions for a "violent felony." *Id.* A "violent felony" under the Act included a crime that "involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 594. The Court found two features of the clause made it vague. *Id.* at 597. First, it required a person to ascertain what the "ordinary" version of the offense involved. *Id.* This was inherently speculative. Second, it was unclear what level of risk made a crime qualify as a violent felony. *Id.* at 598. The Court held that increasing a sentence under this provision violated the prohibition against vague laws. *Id.* at 597.

Then in *Beckles v. United States*, __ U.S. __, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017), the Court rejected a due process vagueness challenge to the federal guidelines, which are merely advisory and thus did "not fix the permissible range of sentences" in a purely discretionary sentence scheme. *Id.* at 894, 999.

Washington's mandatory sentencing scheme is designed to respect the constitutional rights of defendants and comply with *Blakely v.*

Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Laws of 2005, ch. 68, § 1; *State v. Stubbs*, 170 Wn.2d 117, 130, 240 P.3d 143 (2010). The "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303. *Apprendi* and *Blakely* are premised on the rule that facts which increase the punishment for an offense are equivalent to essential elements. *State v. Allen*, 192 Wn.2d 526, 534-35, 431 P.3d 117 (2018).

In *State v. Baldwin*, this Court determined the void-for-vagueness doctrine did not apply to aggravating factors. 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). However, *Baldwin* is contrary to the Court's evolving interpretation of aggravating factors in Washington's mandatory sentence scheme since *Blakely*, as are recent lower court decisions that have relied on *Baldwin* and *Beckles* to deny vagueness challenges to statutory aggravating factors. *State v. DeVore*, 2 Wn. App. 2d 651, 665, 413 P.3d 58 (2018); *State v. Brush*, 5 Wn. App. 2d 40, 59 425 P.3d 545 (2019). Here, though the aggravating factor does not mandate a minimum penalty, it alters the range of punishment. Consistent with Supreme Court precedent and this Court's decision in *Allen*, this Court should accept review and

hold the statutory aggravators set out in RCW 9.94A.535(3) are subject to void for vagueness challenges and the egregious lack of remorse aggravator as applied to Mr. Stanley is vague. RAP 13.4(b)(1)&(3).

b. The "egregious lack of remorse" aggravator is overbroad because it reaches protected speech and conduct.

The First Amendment's protections are not limited to words—conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *State v. Immelt*, 173 Wn.2d 1, 17, 267 P.3d 305 (2011) (citing *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)). The "egregious lack of remorse" aggravating factor for the offense of harassment is unconstitutionally overbroad because it criminalizes protected speech and conduct, including words that "demonstrate an extreme indifference to harm." CP 137.

The Court of Appeals utilizes a four-part balancing test to determine whether a statute is facially overbroad under the First Amendment. *State v. Brush*, 5 Wn. App. 2d 40, 52, 425 P.3d 545 (2018). Application of this test to the "egregious lack of remorse" aggravator for the offense of harassment establishes the statute is overly broad. Mr. Stanley's punishment was increased for failing to show remorse for past words (2015 cyberstalking in conviction) when he was alleged to have uttered words in 2016. This directly implicates a range of behavior and

words protected by the First Amendment. *Id.* at 56. This Court should accept review. RAP 13.4(b)(3).

E. CONCLUSION

Based on the foregoing, petitioner Sloan Stanley respectfully requests this Court deny review of the issue raised by the State in its answer to Mr. Stanley's pro se petition, and to grant review of the issues raised in Mr. Stanley's pro se personal restraint petition and in this reply pursuant to RAP 13.4(b)(1)-(4).

DATED this 18th day of June, 2021.

Respectfully submitted,

/s Kate Benward

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