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ARGUMENT

MR. MILLER'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS FIRST AMENDMENT RIGHT TO FREE SPEECH BECAUSE THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE A "TRUE THREAT."

Conviction under RCW 9.61.160 requires proof of a "true threat," and that phrase must be defined for the jury. *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006). Respondent concedes that the jury was not instructed on the definition of "true threat," in violation of *Johnston*, *supra*. Brief of Respondent, p. 1.

The error is not harmless. Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Here, a reasonable jury could have acquitted Mr. Miller: the evidence of a true threat is not so overwhelming that it necessarily leads to

a finding of guilt. *Burke, supra*. A reasonable juror could have concluded that Mr. Miller's statements were not made in a context or under such circumstances that a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *Johnston*, at 360-361. Indeed, it appears that the operator believed Mr. Miller was making a false report, and that the arresting officer believed the threat had been designed to secure a warm place to stay for the night. Exhibit 2 (Attachment p. 1), CP; *see also* RP (3/24/08) 5; RP (4/8/08) 46.

The court's failure to define the phrase "true threat" was not merely academic; instead, it prejudiced Mr. Miller. Accordingly, the conviction must be reversed and the case remanded to the trial court for a new trial with proper instructions.

CONCLUSION

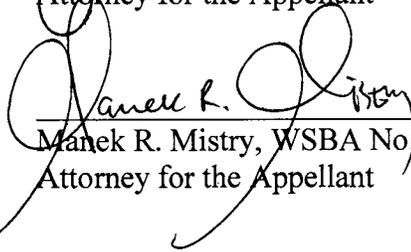
For the foregoing reasons, Mr. Miller's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on December 31, 2008.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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Washington Corrections Center
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and to:

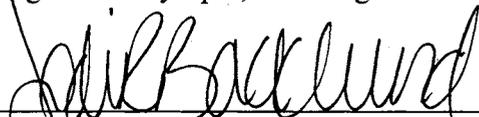
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 31, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 31, 2008.



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