

NO. 80850-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY EARL PUGH,

Petitioner.

RECEIVED
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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES

1. Whether the Washington Constitution can be interpreted as always requiring a showing of unavailability of a declarant before admitting non-testimonial hearsay in light of cases, stretching back to early statehood, that allowed for the admission of hearsay without such showing?

2. Whether statements to a 911 operator were "testimonial" when the statements were made to summon law enforcement following a domestic violence assault, and where the 911 operator would reasonably have believed that the victim was still in harm's way?

B. FACTS

Timothy Pugh and Bridgette Pugh¹ apparently had a stormy marriage. A no-contact order was issued preventing Timothy from contacting Bridgette. Ex. 10, 11; RP 7/20 at 53-54.

On March 31, 2005, the two were together at the home of a friend in the city of Des Moines, King County. At 3:13 a.m. police received a 911 emergency call from Bridgette. Ex. 15.² In that call, Bridgette was

¹ Bridgette's first name will be used for clarity when discussing the facts of this incident, and when discussing the recorded telephone calls from jail.

² This exhibit has been designated on appeal. A transcript of the recorded call was attached to Pugh's opening brief, and will be cited in this brief as "Trans."

breathing heavily and crying. Id. Among other things, she said that she had been assaulted, she asked for police and an ambulance, and she said that she was afraid to go outside because she might be assaulted again. See Trans. of 911 call.

Pugh was originally charged with felony violation of a no-contact order. CP 94. After the State learned he had attempted to prevent the victim from testifying, an amended information was filed charging him as follows: Count I -- felony violation of a no-contact order; Count II -- witness tampering; Count III -- violation of a no-contact order; Count IV -- violation of a no-contact order. CP 73-74; RP 7/11 at 4-5. The trial court severed Count I from Counts II - IV so two separate jury trials were held. RP 7/13 at 68, 96-98.

Pugh was first tried on Counts II through IV, the witness tampering charges. CP 38-40. The 911 tape was challenged pre-trial. RP 7/11 at 99-131. In the witness tampering trial, the court suppressed the 911 tape, statements to medics, and photographs showing Bridgette's injuries. See RP 7/18 at 35-38. Evidence of tampering came mostly in the form of a redacted version of recorded telephone calls. In those calls, Pugh repeatedly apologizes to Bridgette, asks for forgiveness, and requests that she contact his lawyer or the court so that she can recant her earlier

statements to police. Ex. 23 (recorded calls); CP 37 (stipulation regarding recording); RP 7/20 at 96. Pugh did not testify at the witness tampering trial; he was convicted.

Pugh was then tried on Count I, the felony violation of a no-contact order. CP 33-34. The 911 tape was admitted at this trial. Ex. 15; RP 7/28 at 15-16. Officer Meissner testified and said that he was dispatched at 3:15 a.m. to a domestic violence call. He arrived at 3:17 a.m. after quickly checking the area for suspects. RP 7/28 at 23-24. He found Bridgette obviously upset and crying. Id. He noted that she was bruised and had a chipped tooth. Id. at 25. Medics arrived and provided treatment; Officer Meissner then took a recorded statement, and photographed Bridgette's injuries. Id. at 26-27. After a while, Timothy returned and was arrested. He was uninjured. Id. at 33-34.

Officer Young then met with Bridgette the next day and she still seemed upset, shaken up. RP 7/28 at 55-56. He photographed the bruises on her arm, an abrasion on her knee, and the chipped tooth. Id. at 58-62. In June, he delivered a subpoena to her at her Auburn address. Id. at 66. In addition to the 911 tape and the testimony of the officers, the jury in the second trial heard portions of the jail telephone calls in which Timothy asks Bridgette not to testify, and in which he acknowledges assaulting her. Ex. 23; RP 7/28 at 73.

Timothy Pugh testified at this trial. RP 7/28 at 77. He described his relationship with Bridgette, his wife's struggles with cocaine addiction, the fact that she had been missing for days before this event, and that she arrived at the apartment high on crack. Id. at 77-91. He said that they argued, she assaulted him by grabbing his coat, she fell off a ledge, she assaulted him with a three-foot-long rod, she threw four or five cans at him, chased him with a butcher knife, then threw the knife inches from him, so he ran away. Id. at 100-09. Throughout this alleged melee, however, he "never laid hands on her." Id. at 109. On cross-examination, he admitted willful violation of the no-contact order. RP 7/28 at 118-20.

Pugh was convicted as charged on Count I and was subsequently sentenced on all four counts. CP 8-16 (felonies); CP 5-7 (misdemeanors). He appealed and argued that the witness tampering charges must be reversed due to instructional error. The Court of Appeals agreed. State v. Pugh, No. 56935-0-I, slip op. at 3-5 (COA Division I, decided 7/30/07).

Pugh also argued on appeal that Bridgette's hearsay statements to a 911 operator were inadmissible because they violated the State and Federal constitutions. The Court of Appeals rejected both arguments. The court held that the 911 call was not "testimonial" because the 911 operator would reasonably have believed that Bridgette Pugh was in danger, and the operator's questions were clearly designed to elicit information

necessary for an immediate police or medical response. Pugh, slip op. at 5-8. The court also held that Article I, Section 22 of the Washington State constitution does not require a showing of "unavailability" before an excited utterance can be admitted into evidence. Id. at 8-14. The Court of Appeals did not address the State's argument that Pugh forfeited any confrontation clause rights by attempting to persuade Bridgette not to cooperate with authorities. Br. of Resp. at 12-24.

Pugh filed a petition for review raising both the state and federal constitutional issues. The State cross-petitioned and asked this Court to consider, inter alia, whether Pugh forfeited his right to confront Bridgette. This Court granted Pugh's petition for review and denied the State's cross-petition.

C. ARGUMENT

Pugh asks this Court to hold that the Washington constitution requires a showing that the declarant is unavailable before an excited utterance may be admitted into evidence. This argument should be rejected. The text of the constitution contains no such requirement, and Washington cases have long permitted the use of excited utterances without a showing of unavailability. Pugh has demonstrated no compelling reason to independently interpret the state constitution or to reverse precedent.

Pugh also asks this Court to hold that Bridgette Pugh's telephone call to 911 was testimonial because she was describing events that had already occurred. This argument, too, should be rejected. The Court of Appeals correctly held that the statements made in the call were not testimonial because any objective listener would have believed there was an on-going emergency.³

1. NO INDEPENDENT STATE CONSTITUTIONAL INTERPRETATION IS WARRANTED WHERE THERE IS NO EVIDENCE THAT THE DRAFTERS OF WASHINGTON'S CONFRONTATION CLAUSE INTENDED THAT IT COVER MORE CASES THAN THE FEDERAL CLAUSE.

The Sixth Amendment to the United States constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Article I, § 22 of the Washington constitution provides that, "[i]n criminal prosecutions, the accused shall have the right to ... meet the witnesses against him face to face."

Pugh argues that the state right is broader than the federal right in that the state confrontation clause requires a showing of unavailability before hearsay may be admitted. Pet. for Rev. at 10-15.

³ The State relies on its briefing in the Court of Appeals on this point. See Br. of Resp. at 24-32. Several recent decisions by this Court bolster those arguments. See State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007); State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006).

Independent analysis would appear unnecessary in light of State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998). In Foster, a child witness testified in the judge's chambers, accompanied by the prosecutor, defense counsel, and the court reporter; her testimony was broadcast, live, into the courtroom, where the defendant and the jury were seated. Foster, 135 Wn.2d at 444. On appeal, Foster contended that his state constitutional right to meet adversarial witnesses "face to face" was compromised by this arrangement. Id. at 449-50. By a 5-4 decision, Foster's conviction was upheld. After engaging in a Gunwall⁴ analysis, four justices concluded that the federal and state constitutional rights to confrontation provided identical protection. Foster, 135 Wn.2d at 466. Four other justices believed that art. I, § 22, provided more expansive protection than the Sixth Amendment. Id. at 497-98. These dissenting justices did not believe, however, that the existing hearsay rules were restricted by the state constitution. Rather, the dissenters distinguished the *scope* of the confrontation right from the *manner* of confrontation, assuming such right applied in a given instance.

Contrary to the concerns of the majority, a strict reading of the confrontation clause in article I, section 22 does not implicate hearsay concerns. As noted above, the issue we face is the method by which an accused is

⁴ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

guaranteed confrontation, not whether the accused is guaranteed confrontation at all. Under the hearsay exceptions, a value judgment has already been made that the accused is not entitled to confront those persons making the qualifying statements. Only after the right of confrontation arises with regard to available witnesses must we decide the method by which the accused is entitled to exercise that right. The correct analysis asks: (1) Does the accused have a right to confrontation in the given instance? (2) If so, to what type of confrontation is the accused entitled?

Foster, 135 Wn.2d at 495 (C. Johnson, J., dissenting). Thus, even the dissenting justices recognized that the unique language in the Washington clause focused on the *means* by which an *available* witness could be examined. Id. Implicitly, this passage recognizes that the phrase "witness against him" is the phrase that deals with the scope of the clause vis-a-vis the hearsay rules, whereas the phrase "face-to-face" deals with the manner of confrontation.

Justice Alexander wrote separately and concluded that the state and federal guarantees of confrontation were not identical, and that separate analysis under article I, section 22, was necessary, but Justice Alexander believed the closed-circuit procedure satisfied the "face-to-face" requirement. Id. at 474 (Alexander, J., concurring).

Thus, it appears that a majority of this Court has concluded that the state right to confront witnesses is broader only as to the manner of confrontation, but not as to when the right applies in the first place. Such

an interpretation of the relevant provisions is reasonable. Both the federal and the state clause refer to the right to confront the "witnesses against him." Presumably, that identical phrase means the same thing in both clauses. The Washington clause is, however, somewhat more particular in guaranteeing a "face to face" confrontation, but this greater specificity is important only as to the manner of confrontation.

Still, to the extent there is arguably some ambiguity over whether Foster decides the reach of the state confrontation clause, a Gunwall⁵ analysis may be warranted. The Gunwall factors do not show, however, that the Washington constitution is broader as to the issue presented in this case.

As discussed in Foster, the text of the Washington constitution is different than the text of the federal provision, but only as to the manner of confrontation. Thus, factors one and two weigh in favor of a consistent state/federal analysis. There is scant constitutional history regarding article 1, section 22, so factor three does not assist in this analysis. The text and history are sufficient to suggest, however, that the purposes of the

⁵ State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986) ("The following nonexclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.")

state and federal constitutional provisions pertaining to the right of confrontation appear to be the same. Pettit v. Rhay, 62 Wn.2d 515, 519-20, 383 P.2d 889 (1963).

Pre-existing state law also strongly suggests that the state clause is no broader than the federal clause when it comes to the intersection of confrontation rights and the law of hearsay. Several cases were cited and discussed in the State's brief below establishing that many categories of hearsay evidence, including excited utterances, were readily admitted in Washington in the same manner as in the federal courts, and without a constitutional requirement that unavailability be established. Br. of Resp. at 34 (hearsay exceptions generally) and 35-40 (discussing the res gestae exception).⁶

The following additional cases support that conclusion. See State v. Ripley, 32 Wash. 182, 72 P. 1036 (1903) (robbery victim knocked unconscious; statements made immediately upon awakening admissible as res gestae); State v. Lathrop, 112 Wash. 560, 192 P. 950 (1920) (exclamations by deceased after being shot but before death were

⁶ Key cases include the following: State v. Smith, 26 Wash. 354, 67 P. 70 (1901) (statements of robbery victim); State v. Hazzard, 75 Wash. 5, 134 P. 514 (1913) (statements of deceased admitted as res gestae); Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939) (reviewing the history of the res gestae exception).

admissible as res gestae); State v. Goodwin, 119 Wash. 135, 204 P. 769 (1922) (explosion on a boat killed four; fatally injured victim's statements blaming defendant for dynamiting the boat were admitted under res gestae exception); State v. Labbee, 134 Wash. 55, 234 P. 1049 (1925) (statements of victim identifying homicide suspect 10-15 minutes following shooting, in response to questions, were admissible under res gestae); State v. Kwan, 174 Wash. 528, 25 P.2d 104 (1933) (statements of murder shooting victim identifying shooters admissible as part of the res gestae); State v. Mayer, 154 Wash. 667, 283 P. 195 (1929) (statements of missing man regarding his plans to return were admissible); State v. Much, 156 Wash. 403, 287 P. 57 (1930) (exclamations of witnesses following discovery of body were admissible); State v. Mooney, 185 Wash. 681, 56 P.2d 722 (1936) (deceased's statement that defendant said, "I suppose I will hang for this," was admissible as part of res gestae); State v. Green, 38 Wn.2d 240, 229 P.2d 318 (1951) (statement of witness to hunting accident admissible as part of res gestae, even though it was not true). In none of these cases did the Court suggest that the state constitution limited the res gestae exception, or that unavailability of the declarant need be proved.⁷ And,

⁷ Pugh seems to suggest the res gestae cases are irrelevant because the excited utterance exception did not originate from the res gestae exception. He is mistaken; the res gestae exception became two separate exceptions under the rules of evidence -- the present sense impression exception and the excited utterance exception. See 5 R. Meisenholder, Washington Practice § 491 at 181(1979 pocket part) (1965).

evidences treatises were silent as to any unavailability requirement, even when discussing the state constitutional right to confront witnesses. See 5 R. Meisenholder, Washington Practice § 263 at 229 (1965).

Finally, Pugh has not shown that structural differences or local concerns require independent construction. In fact, as this Court held long ago, the federal clause and the state clause share common purposes. Pettit v. Rhay, 62 Wn.2d at 519-20.

Thus, the text, structure, and purposes of the state clause appear to be the same as the federal clause, and pre-existing state law does not support independent interpretation of the state confrontation clause. For these reasons, this Court need not independently analyze the Washington confrontation clause as to the issue presented in this case.

2. ARTICLE 1, SECTION 22 DOES NOT REQUIRE THAT A DECLARANT BE SHOWN TO BE UNAVAILABLE BEFORE AN EXCITED UTTERANCE CAN BE ADMITTED INTO EVIDENCE.

Assuming this Court does independently analyze the state constitution, neither the text nor the available historical evidence suggest that unavailability of the declarant must be proved before an excited utterance can be admitted into evidence. In the absence of such text or historical evidence, an "unavailability" requirement should not be written into the constitution.

Under existing state and Federal law, there are three categories of hearsay that might be admitted in a criminal trial: 1) testimonial hearsay subject to constitutional constraints; 2) non-testimonial hearsay subject to ER 803; and 3) non-testimonial hearsay subject to ER 804.

In 2004, the Supreme Court embarked on a new path of constitutional analysis of the confrontation clause. It decided that testimonial hearsay -- statements that are the "functional equivalent of testimony" -- were at the core of the concerns of the drafters of the confrontation clause. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Statements made to resolve an emergency are not within that core group. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). But, if a statement is testimonial, it may be admitted into evidence *only* if the witness actually appears at trial, or if the defendant was previously able to confront the witness. Thus, unavailability is irrelevant because the witness is *required to appear*.

Non-testimonial hearsay, on the other hand, is admissible subject only to the rules of evidence; the constitution plays no role in regulating this type of hearsay. Davis, 547 U.S. at 821. Thus, the hearsay rules govern two categories of non-testimonial hearsay.

The first category deals with hearsay exceptions that have long been recognized as trustworthy even in the absence of cross-examination. ER 803(a) sets forth twenty-three categories of such hearsay which is expressly admissible regardless of whether the declarant is available to testify.⁸ The Judicial Council Comment made clear that this rule was wholly consistent with Washington law:

This rule is the same as Federal Rule 803, except that one addition is made in subsection (a)(13), a minor editorial improvement is made in subsection (a)(22), and subsection (a)(24) is omitted. Subsection (a)(1). This subsection is consistent with previous Washington law. Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939). Subsection (a)(2). This subsection is consistent with previous Washington law. Beck v. Dye, supra.

5B Teglund, Washington Practice, § 803.1, p. 410 (4th ed. 1999).

As illustrated by the cases cited above at 10-12, and in the briefing in the Court of Appeals, Br. of Resp. at 32-45, the res gestae exception -- also known as the spontaneous declaration or excited utterance exception -- has long been admissible without cross-examination because spontaneous statements made immediately after a traumatic event are imbued with a high level of trustworthiness. This notion is deeply rooted

⁸ The exceptions cover all manner of evidence including: present sense impressions; excited utterances; then-existing mental, emotional, or physical conditions; statements for purposes of medical diagnosis and treatment; recorded recollections; records of regularly conducted activity; absence of record entries; public records and reports, records of vital statistics; the absences of public records or entries; records of religious organizations; marriage, baptismal and similar certificates; family records; records of documents

in Washington law from the late 19th century to the present. See 5 R. Meisenholder, Washington Practice, Spontaneous Utterances (Res Gestae) Ch. 26, § 491 at 471-76 (1965); State v. Aldrick, 97 Wash. 593, 166 P. 1130 (1917);⁹ Beck, 200 Wash. at 8-10; State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995). The trustworthiness of such evidence could not have been so firmly rooted if the Washington constitution prohibited such statements without cross-examination. Indeed, as Aldrick shows, courts believed that cross-examination was not necessary as to res gestae evidence. It follows that the constitution does not *require* a showing of unavailability.¹⁰

Moreover, this Court decided twenty years ago in a unanimous opinion that the federal constitution does not require a showing of

affecting an interest in property; statements in documents affecting an interest in property ... ER 803(a)(1)-(16).

⁹ "What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted."

¹⁰ Pugh relies on "fact of complaint" cases to suggest that the res gestae rule is inconsistent with the right to confront witnesses. Pet. for Rev. at 14. But, as this Court described in State v. Aldrick, 97 Wash. 593, 166 P. 1130 (1917), the "fact of complaint" doctrine is distinct from the res gestae exception. Aldrick was charged with raping a 15-year-old girl and the girl's father was allowed to relate a narrative by his daughter concerning rape. The conviction was reversed because the narrative exceeded the bounds of the "fact of complaint" doctrine. The Court noted, however, that "fact of complaint" was a rule developed to permit some limited corroboration of a rape victim's testimony, whereas statements made during or shortly after an event were admissible under the res gestae doctrine because such statements were believed to be part of the transaction itself. Aldrick, at 595-96. Aldrick simply holds that under the facts of that case, a narrative given the morning after the rape satisfied neither the "fact of complaint" rule nor the res

unavailability before admission of an excited utterance. State v. Palomo, 113 Wn.2d 789, 783 P.2d 575 (1989), cert. denied, 498 U.S. 826 (1990). In Palomo, a police officer came upon Palomo late at night in downtown Seattle, straddled atop a woman in a doorway. Palomo's pants were open at the front, the woman's pants were down to her knees, and Palomo was grabbing at the woman's pantyhose, attempting to pull them down. The woman was hitting and scratching at Palomo's face and screaming for help. As the officer separated them, the woman exclaimed that Palomo was trying to rape her, and told the officer to "get him away from me." Palomo, 113 Wn.2d at 791. For some unexplained reason, the woman never testified at trial. Id. at 791-92.

Palomo argued that failure to show unavailability violated the state and federal confrontation clauses. This Court did not reach the state constitutional challenge because it was not sufficiently briefed. But, this Court analyzed the federal claim in detail and concluded that unavailability of the declarant need not be proved before an excited utterance is admitted into evidence. Id. at 795-97. This Court noted that although unavailability was required as to former testimony, id. at 795 (citing Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597

gestae rule. Thus, cases discussing the "fact of complaint" in a rape case tell us nothing about the scope of the res gestae exception.

(1980)), it was not required as to co-conspirator statements. Id. (citing United States v. Inadi, 475 U.S. 387, 393, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) (co-conspirator statements admissible without showing of unavailability)). See also Bourjaily v. United States, 483 U.S. 171, 182-184, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

Palomo was been cited with approval in several of this Court's more recent decisions. For example, in State v. Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992), this Court observed that the case for admissibility had only grown stronger since Palomo. Strauss, 119 Wn.2d at 415 (citing Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 3146, 111 L. Ed. 2d 638 (1990) (hearsay is admissible without showing unavailability if the hearsay falls within a firmly-rooted exception)) and White v. Illinois, 502 U.S. 346, 355-56 n.8, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) (spontaneous declarations exception is firmly-rooted)). In State v. Chapin, 118 Wn.2d 681, 685-86, 826 P.2d 194 (1992), this Court noted in passing that firmly-rooted hearsay exceptions are admissible without a showing of unavailability. In State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000), this Court again confirmed that the constitution did not require a showing of unavailability. Davis, 141 Wn.2d at 843 n.252.

By contrast, ER 804 expressly provides that "[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a

witness: (1) Former Testimony ... (2) Statement Under Belief of Impending Death (3) Statement Against Interest ... [and a] (4) Statement of Personal or Family History." Unavailability is determined according to the standards of ER 804(a).

The above-cited cases and rules show that in Washington, unavailability is a statutory, or rule-based requirement, but not a constitutional one. In the absence of language in the state constitution that requires an unavailability showing, the State respectfully suggests that this Court should not create one.

Finally, the foreign authorities relied upon by Pugh, in particular State v. Moore, 334 Or. 328, 49 P.3d 785 (2002), are not persuasive. First, Oregon's confrontation clause does not contain the critical words "witness against him" that are contained in the federal and Washington State clauses. Or. Const. Article I, section 11 provides: "In all criminal prosecutions, the accused shall have the right ... to meet the witnesses face to face." This textual difference on the key language is significant, in that the primary question in Crawford and other confrontation clause cases has been the question whether "witness against him" means people called to Court or simply people who see, i.e. "witness" a crime. Since the Washington constitution uses the exact same language as the federal

constitution, the arguments for parallel construction are greater for Washington than for Oregon.

Second, the Oregon Supreme Court previously rejected the rationales of White v. Illinois, United States v. Inadi, and Idaho v. Wright, see State v. Campbell, 299 Or. 633, 705 P.2d 694 (1985), whereas this Court adopted the federal standard for Washington, Palomo, 113 Wn.2d 795-97, and applied its reasoning in subsequent cases. Strauss, 119 Wn.2d at 415; Chapin, 118 Wn.2d 685-86; Davis, 141 Wn.2d at 843 n.252. Acceptance of the federal authority, and adoption of the rule that firmly rooted hearsay exceptions are admissible without a showing of unavailability, is wholly appropriate in light of Washington's constitutional text, structure and history.

Finally, there are other compelling reasons to resist finding a state constitutional basis for an unavailability requirement. First, as argued above, nothing in the text of article 1, section 22, no Washington case interpreting that provision, and nothing in the text of the evidence rules suggests that a witness must be unavailable before any exception listed in ER 803(a) can be admitted into evidence. Given the scores of early Washington cases discussing the res gestae exception, and given the absence of any indication that the Washington constitution required a

showing of "unavailability" before the exception could apply, it would be inappropriate to find such a requirement now, after 130 years.

Second, the United States Supreme Court, legal scholars, and commentators have struggled for over a century with "[t]he complexity of reconciling the Confrontation Clause and the hearsay rules" resulting in numerous opinions from the Court. See Roberts, 448 U.S. at 66 n.9. Some exceptions required a showing of unavailability, while others did not. Id. at 65 n.7 (citing Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)); Inadi, 475 U.S. at 393; Wright, 497 U.S. at 813-16; White, 502 U.S. at 355-56. The shift in analysis occasioned by Crawford is just the latest addition to this complexity.

Were this Court to find a state constitutional basis for an unavailability requirement, especially where no language exists in the constitution to define the scope of that requirement, the Court would be adding yet another layer of complexity to the confusion that has already plagued the United States Supreme Court's jurisprudence. For example, the most pressing question would become whether, and how, an unavailability requirement would apply to the 22 other hearsay exceptions listed in ER 803(a). Although this Court has previously held that unavailability need not be shown as to the business or public records

exceptions,¹¹ it is likely that state constitutional challenges would be raised as to these exceptions, and it is unclear how this Court would distinguish those exceptions from the others listed in ER 803(a).

Third, adopting a reading of the state constitution that will simply add complexity to this already tangled area of the law is not necessary. If an unavailability requirement is to be added to Washington law, it can be added selectively by amendment of ER 803(a). If the evidence rules are so amended, all interested parties will have an opportunity to comment such that the final rule -- and its scope -- will be better understood. If, on the other hand, this Court announces a new state constitutional requirement, its reach will be poorly understood, and the interpretation will spur extensive, costly litigation over the ruling's scope.

For these reasons, the State respectfully asks this Court to hold that the Washington constitution does not compel a finding of unavailability before admission of hearsay under ER 803(a).

¹¹ See State v. Kreck, 86 Wn.2d 112, 118-121, 542 P.2d 782 (1975) (business records) and State v. Bolen, 142 Wash. 653, 663, 254 P. 445 (1927) (public records).

3. BRIDGETTE PUGH WAS UNAVAILABLE AS A WITNESS BECAUSE SHE WAS NOT AMENABLE TO SERVICE AND BECAUSE TIMOTHY PUGH DID NOT WANT HER TO TESTIFY.

Even if this Court decides that the proponent of an excited utterance must show that the declarant is unavailable before admitting a 911 tape, the State satisfied that burden under these facts.

“[A] witness is not ‘unavailable’ for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” Ohio v. Roberts, 448 U.S. at 74 (citing Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L.Ed.2d 255 (1968)). The standard for establishing unavailability in ER 804 requires:

(a) Definition of Unavailability

“Unavailability as a witness” includes situations in which the declarant: ...

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

ER 804(a).

The record in this case shows that Bridgette Pugh was not cooperating with the prosecutor. RP 7/11 at 8-9 (“...highly unlikely Ms. [Pugh] will make herself available for trial...”); Id. at 116 (Defense counsel: “...it is very likely that Bridgette Pugh will not testify during the

trial despite the best efforts of both parties to bring her here."). The State served Bridgette with a subpoena but she failed to appear for trial. RP 7/28 66. These attempts satisfy ER 804(a)(5).

Second, the evidence presented in the witness tampering trial clearly established that Pugh tried his best to keep Bridgette from testifying in court. See Ex. 23 (telephone calls -- transcript attached to appellant's opening brief below); RP 7/11 29 (prosecutor had limited access to witness due to tampering). Yet, when she failed to appear, he invoked his constitutional right to confront her. It is this sort of gamesmanship that the doctrine of forfeiture by misconduct is designed to prevent. If Pugh genuinely wanted to confront Bridgette, he would not have persuaded her to resist cooperating with the authorities, and he might also have invoked his right to compulsory process. Const. Art. 1, § 22. His conduct belies his true motives; Pugh did not want Bridgette to testify in this case. In any event, the State's efforts to secure her presence satisfy ER 804 and the good faith efforts standard.

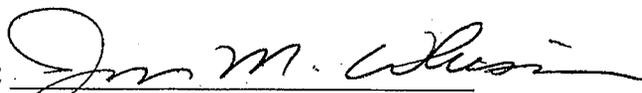
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reject Pugh's invitation to create an unavailability requirement that is not compelled by our constitutional text, structure or history. The State respectfully asks this Court to affirm the opinion of the Court of Appeals.

DATED this 15th day of August, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

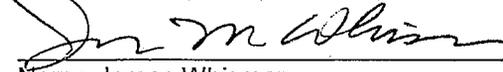
By: 
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FILED AS ATTACHMENT TO E-MAIL

Certificate of Service by Mail

Today I sent by electronic mail to Maureen M. Cyr, the attorney for the appellant, a copy of the Supplemental Brief of Respondent, in State v. Timothy Pugh, Cause No. 80850-3 in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name James Whisman
Done in Seattle, Washington

8/15/08
Date 8/15/08