

CLERK OF COURT  
COUNTY OF KING COUNTY  
JUL 10 10 42

No. 67726-8-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

ERISTUS JORDAN J.,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY,  
JUVENILE DIVISION

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

*Q (defense): So what was the purpose of you trying to stay outside?*

*A (defendant): My purpose of staying outside was just for me to supervise and seeing, just to make sure my sister was all right. Because after I seen the officer pull out his nightstick, I was kind of edgy like me just leaving my sister alone because she couldn't do something like a little movement that probably could have caused the officer to hit her upside [t]he head with that nightstick . . .*

*Q: Have you ever seen police be violent with an individual before in the past?*

*[State]: Objection, your Honor.*

*A: Yeah.*

*[Court]: Overruled.*

*Q: Did you say yes or no; have you ever seen an officer be violent with a person in the past?*

*A: Yes.*

*Q: Was the officer in uniform?*

*A: Yes.*

RP 71.

I. ADVOCATING A CONVICTON BASED ON PROTECTED SPEECH AND PRIVATE CONDUCT, THE STATE IGNORES FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL LAW.

a. Respondent cannot cite any authority showing that

Jordan's speech was not fully protected under the First

Amendment to the United States Constitution. “[A]s a general

matter . . . government has no power to restrict expression

because of its message, its ideas, its subject matter, or its

content.” Brown v. Entertainment Merchants Ass'n, \_\_\_ U.S.

\_\_\_, 131 S. Ct. 2729, 2735, 180 L. Ed. 2d 708 (2011) (quoting

Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573,

122 S. Ct. 1700, 152 L. Ed. 2d. 771 (2002)). Thus, the

Constitution “demands that content-based restrictions on speech

be presumed invalid . . . and that the Government bear the

burden of showing their constitutionality.” United States v.

Alvarez, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2537, 2543–44 (2012) (quoting

Ashcroft, 542 U.S. at 660).

Content-based restrictions are permitted only within a

few narrowly-defined categories. They are: incitement,

obscenity, defamation, speech integral to criminal conduct,

“fighting words,” child pornography, fraud, true threats, and grave and imminent threats that the government has power to prevent. Alvarez, 132 S. Ct. at 2544 (internal citations omitted). “These categories have a historical foundation in the Court’s free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.” Alvarez, 132 S. Ct. at 2544.

As demonstrated in Appellant’s Opening Brief (AOB) and below, Jordan’s speech does not fall into any of these “low-value” speech categories. Respondent does not and cannot demonstrate that it does. Accordingly, any restriction on that speech is illegal. R.A.V. v. City of St. Paul, 505 U.S. 377, 396, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

*i. Jordan’s claim is rightfully before this Court, as an as-applied constitutional challenge and as a manifest error affecting a constitutional right.* Respondent asserts that Jordan’s First Amendment claim is not an as-applied challenge because “The obstructing statute does not prohibit the conduct or acts the defendant complains.” Resp. Br. 12–13. Respondent

cites to no authority. But it is clear from the record that the obstruction statute—which Jordan was convicted of violating—does prohibit calling police officers names, as this was a partial basis for Jordan’s conviction. See RP 96, 99–100; CP 14, 15 (juvenile court’s findings of fact concerning Jordan’s “taunting” of the police officers). Respondent claims, “the statute does not make it illegal to call an officer a racial slur. It is only acts that are done with the willfulness to obstruct that fall under the scope of the statute.” Resp. Br. 13 n. 7. As discussed below, this distinction is meaningless under the First Amendment. Jordan’s as-applied constitutional challenge should be heard by this Court. See State v. Budik, 173 Wn.2d 727, 732, 272 P.3d 816 (2012).

Furthermore, Jordan may raise his constitutional claims under RAP 2.5(a)(3), permitting challenges to “manifest error[s] affecting [ ] constitutional right[s].” Respondent appears to claim that Jordan cannot demonstrate that the constitutional errors made by the juvenile court here were manifest. Resp. Br. 13 n. 8. But they directly affected his constitutional rights, by prohibiting protected speech, infringing on his right to be free

from unreasonable searches in his own home, and by burdening his fundamental right to observe police officers performing official duties. See AOB 11–23. Moreover, the errors were actually prejudicial because the protected conduct served as critical evidence for his conviction. See AOB 23–25; State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). This Court should hear the claims.

*ii. The mens rea element of RCW § 9A.76.020(1) does not render it constitutional as applied to Jordan’s words.* Respondent compares this case to Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), arguing that any speech with a culpable *mens rea* is unprotected under the First Amendment. Resp. Br. 14 (“[T]here is a *mens rea* element to the crime of obstructing, specifically that the obstructer must ‘wilfully’ engage in the acts . . . As stated in Virginia v. Black . . . this *mens rea* element eliminates the argument that the speech is protected under the First Amendment.”). Resp. Br. 13–14.

But the fact that speech is accompanied by a generic *mens rea* does not render that speech any less protected under the Constitution; rather, only speech accompanied by specific,

enumerated *mens reas* may be punished—for example, true threats, fighting words, and incitement. See Alvarez, 132 S. Ct. at 2544 (internal citations omitted). Black illustrates that principle: the statute at issue in that case prohibited cross burning “with an intent to intimidate a person or group of persons.” Black, 538 U.S. at 347 (citing Va. Code Ann. § 18.2-423 (1996)). The Court explained that the proscription was constitutional because the “intent to intimidate” rendered the speech a “true threat”—that is, squarely within one of the narrowly drawn categories of speech upon which the State may rightfully infringe. Black, 538 U.S. at 359–60, 362–63.

That is not the case here. The following statements of Jordan were in evidence:

- 1) At first, Jordan was “trying to tell his sister to just go and to just leave.” RP 27.
- 2) “[Jordan] then advised that that was his sister.” RP 40.
- 3) Jordan “called [the officers] several names, used profanities the whole entire time.” RP 43.
- 4) “[Jordan] called [an officer] a fat fuck several times. He used the word mother-fucker several times. I believe he used the word “bitches” several times throughout the whole entire exchange.” RP 44.

5) [Jordan] yelled, "that's my sister, that's my sister."  
RP 45.

6) "[Jordan] came out and he tried to control [RJ] and tell her not to be hitting, you know, trying to fight me."  
RP 60.

7) "[Jordan] called [the officers] pigs and honkies." RP 60.

The juvenile court made the following findings as to Jordan's speech:

1) "Mr. Johnson call[ed] the officer a number of names, including pigs and honkies." RP 96.

2) "Mr. Johnson was calling the police officers names." RP 99–100.

3) "Mr. Johnson was engaged in a back-and-forth with the officers. The word 'taunting' came up . . . it's very clear to the court that by raising his voice and calling the officers names, he was making his presence known to his sister, and the testimony was that through his presence, it made it more difficult for the officers to do their job." RP 100

4) "[W]hen Respondent began speaking in a loud and excited voic[e], [RJ] became agitated." CP 14.

5) "Respondent called the officers several insulting names including 'Pig,' 'Honkey,' and 'Motherfucker.' Respondent was yelling and swearing as Officer Jenkins walked him to the door." CP 15.

During the interaction, the officers made the following statements to Jordan:

- 1) They told him to “go inside and relax.” RP 28.
- 2) “We then let him know we were in the middle of an active investigation and that we needed him to step back inside the house and close the door.” RP 40.
- 3) They “advised him that he could be arrested for obstructing if he did not return back inside the house.” RP 41
- 4) “I asked him: Could you close the door?” RP 43.
- 5) “[The officers] said shut the eff up, mother-eff, and go back inside.” RP 72.
- 6) “And [the officer] was like: If you open that door again, you will be arrested for obstructing. That’s what he said.” RP 5.
- 7) “And [the officer] was like: Can I help you? And I was like: Don’t—what are you doing with that nightstick? Don’t hit my sister with that. And he was like: Go back inside.” RP 79.

Aside from his citation to Black and *mens rea* argument, Respondent makes no attempt to classify Jordan’s words as a “true threat.” Rightfully so: “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to

a particular individual or group of individuals.” Black, 538 U.S. at 359. As evident from the record, that is not what happened here. Based on the officers’ testimony, the court found that Jordan made no “threatening movements or statements toward the officers at any time during [his] interaction with the officers.” CP 14. His speech was fully protected speech under the First Amendment.

*iii. Jordan’s speech was not, as Respondent appears to claim, integral to a crime.* Respondent asserts that there is a “plethora of Supreme Court cases that hold that the First Amendment does not prohibit the use of speech to prove the elements of a crime.” Resp. Br. 14. There is no additional argument here, and Respondent’s characterization of the subsequent string-cite of cases is not directly on point. The First Amendment *often* prohibits protected speech from being punished as a crime. See, e.g., Hess v. Indiana, 414 U.S. 105, 108–09, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973) (State may not use words “We’ll take the fucking street later” or “We’ll take the fucking street again” to convict defendant of disorderly conduct); Cohen v. California, 403 U.S. 15, 26, 91 S. Ct. 1780, 29 L. Ed. 2d

284 (1971) (State may not use words “Fuck the Draft” to convict defendant of disturbing the peace).

Furthermore, the cases Respondent cites—Giboney v. Empire Storage, for example, or Haput v. United States—are not similar to the case at bar. In Giboney, which is not a criminal case, the Court held that picketers could be enjoined from using their signs to compel an ice company to break the law. 336 U.S. 490, 504, 69 S. Ct. 684, 93 L. Ed. 834 (1949). In Haput, the defendant was convicted of treason, but the Court did not address a First Amendment challenge—the pinned citation Respondent gives does not show otherwise. 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947); see Resp. Br. 14. In Price Waterhouse v. Hopkins, another civil case, the First Amendment is mentioned in passing, but plays not part in the disposition, and again, Respondent’s pincite is only loosely connected to the point he intends to make. See 490 U.S. 228, 251–52, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), superseded by statute on other grounds. State v. Talley and Wisconsin v. Mitchell both concern “hate crime” statutes, for which speech may be used *but only* to show that hate was the motive for

conduct for which the State has a legitimate interest in prohibiting. See State v. Talley, 122 Wn.2d 192, 206–210, 858 P.2d 217 (1993); Wisconsin v. Mitchell, 508 U.S. 476, 487–89, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993). Mitchell includes citations to Price Waterhouse and Street, but Mitchell included those cases as a “see also,” not as direct support. See Mitchell, 508 U.S. at 490. They do not stand for as much as Respondent hopes.

For example, Street v. New York actually holds that a defendant could *not* be convicted under the First Amendment for burning an American Flag and using “contemptuous words” about it. 394 U.S. 576, 594, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969). The Court went on to state, “nothing in this opinion would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way.” Id. But that is not the holding of Street, as Respondent claims, and it is not its main lesson.

Words may properly be used for conviction when they constitute the crime itself, or are an integral part of effectuating a crime. Such is the case when, as Respondent notes, a “robber .

. . order[s] his victim to hand over the money.” Resp. Br. 14–15, (citing United States v. Quinn, 514 F.2d 1250, 1268 (5th Cir. 1975), cert. denied, 424 U.S. 955). Calling police officers “pigs” and “honkeys” could not be used to “obstruct” three adult police officers in their arrest of a juvenile girl. These words were in no way “integral” to a crime. Their punishment is not constitutional under the First Amendment.

b. The State fails to respond to Appellant’s argument showing that the officers violated the Fourth Amendment and Article I, § 7 by reaching into Jordan’s home and by commanding him to close the door. During the incident at Jordan’s home, Officer Jenkins reached in and closed the solid wood door. RP 75; CP 15, FF 17. In addition, the officers ordered Jordan several times to close the solid door, and Jordan was convicted of obstruction for refusing to do so. See CP 14–16, FF 11, 15, 17, 18, 25. These intrusions were unreasonable, without the authority of law, and were violations of Jordan’s rights under the Fourth Amendment to the U.S. Constitution and Article I, § 7 of the Washington Constitution. See AOB 16–19.

The State claims, “no search occurred inside the Johnson home.” But Officer Jenkins physically *reached in* to Jordan’s home, without a warrant, to attempt to close the front door. RP 43, 75; CP 15, FF 17. Moreover, an officer’s intrusive actions may violate Article I, § 7 even where they occur outside the home. See State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). And a “search” is not required under Article I, § 7. Rather, Article I, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

Here, the officers had no authority of law—neither warrant nor cause—to intrude into Jordan’s private affairs in his home. See AOB 18–19. By ordering him to close his door and by physically reaching into his home, they violated Article I, § 7. Respondent claims that Jordan’s actions were in plain view, and therefore not covered by constitutional protections. Resp. Br. 16. But it is the officers’ actions—not Jordan’s—that are the problem here. Finally, Respondent claims that Geraldine Johnson’s invitation into her home to take her daughter sanctioned the officers’ subsequent treatment of Jordan and

intrusion into the home. Resp. Br. 16. But Geraldine’s invitation was for the limited purpose of going in to take out her daughter; the officers’ intrusion into the home was limited to that purpose. see State v. Cotton, 75 Wn. App. 669, 680, 879 P.2d 971 (1994) (“Exceeding the scope of consent is equivalent to exceeding the scope of a search warrant.”); RP 58–59.

c. Jordan’s conviction violates substantive due process, and the State attempts no responsive counterargument. Respondent states, “[T]he obstruction statute does not prohibit a person from observing the police. Thus, the application of due process to the statute in this manner is inapplicable.” Resp. Br. 18. But as applied to Jordan, the obstruction statute *does* prevent citizens from observing the police. See CP 15, FF 15–18 (FF 15: “Respondent refused to close the front door because he wanted to supervise the scene and make sure Ruby was not harmed during her interaction with the officers”); (FF 18: “Officer Jenkins wanted Respondent to close the solid door for officer safety, to avoid agitation of ruby, and to *prevent Respondent [Jordan] from seeing what was going on.*” (emphasis added)). These findings were the basis of Jordan’s conviction.

See JuCR 7.11(d); State v. Head, 136 Wn.2d 619, 621–22, 964 P.2d 1187 (1998).

Respondent next states, “While the defendant does not cite to applicable case law, substantive due process can be a tool used to challenge specific egregious actions of the police.” Resp. Br. 18. Appellant did not cite this law because that is not his argument. See AOB 19–23. Again, the State fails to respond to Appellant’s claim.

II. WHETHER FULLY CONSTRUED OR  
ABSENT THE CONSTITUTIONALLY  
PROTECTED CONDUCT, THE RECORD  
CONTAINS INSUFFICIENT EVIDENCE TO  
CONVICT JORDAN OF WILLFUL  
OBSTRUCTION.

The State argues that it is impossible to weigh sufficiency of the evidence while leaving out evidence that was unconstitutionally relied upon for conviction. Resp. Br. 21. But this is the method the United States Supreme Court relies upon in reversing convictions based on protected conduct. See Hess, 414 U.S. at 108–09 (stating that there was no evidence of words’ status as unprotected speech, and therefore reversing conviction because there was insufficient *unprotected* speech or conduct

upon which to base charge); see also Cohen, 403 U.S. at 26 (“State may not . . . make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.”).

Even if all of the evidence were included, and even in the light most favorable to the state, there was insufficient evidence that Jordan committed the crime of obstruction. “A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” RCW 9A.76.020(1). “‘Hinder’ means ‘to make slow or difficult the course or progress of.’” State v. Steen, 164 Wn. App. 789, 799, 265 P.3d 901 (2011) (citing Webster’s Third Int’l Dictionary 1070 (2002)). “‘Delay’ means ‘to stop, detain, or hinder for a time . . . to cause to be slower or to occur more slowly than normal.’” Steen, 164 Wn. App. at 799 (citing Webster’s at 595). “‘Obstruct’ means “‘to be or come in the way of: hinder from passing, action, or operation.’” Steen, 164 Wn. App. at 799 (citing Webster’s at 1559). “A person acts willfully when he acts

knowingly with respect to the material elements of the offense.”  
RCW 9A.08.010(4).

Here, there was insufficiency on several levels. First, there was not evidence that “Jordan knew that his presence was making it difficult for the officers to keep Ruby still and calm.” CP 14, FF 9. There were three grown men—Officers German Berreto, Sean Jenkins, and Mark Mullins—with a juvenile girl who was no taller than 5’4” or 5’5”. RP 18, RP 80. Based on that scenario, Jordan’s standing in the doorway and watching the officers—even calling them names—could not be enough to “obstruct,” “hinder,” or “delay” the officers in their arrest of RJ. Officer Barretto testified that Jordan’s presence “escalated” the situation, but when asked how so, he said that it made RJ “agitated” and “hostile.” RP 21–24; see RP 96. He did not say that he was unable to contain RJ, or that along with two of his other officers, it was much more difficult to control the situation. By all accounts, Jordan told his sister to go peacefully and to leave the house. RP 27. His testimony was that after she decided to stay, he just wanted to watch to ensure that his sister would not be harmed by the officers. RP 71; CP 15, FF 15. And because

he insisted on watching his sister and being present to observe what would happen when three police officers tried to calm his sister—officers who repeatedly attempted to keep him from watching—Jordan was convicted of obstruction. This cannot be consistent with the intention of the Legislature; and the evidence on the record is insufficient to satisfy the elements required.

III. THE STATE CANNOT SHOW THAT  
RCW 9A.76.020(1) IS NOT  
UNCONSTITUTIONALLY OVERBROAD.

Respondent argues that the “language challenged here has *never* been ruled unconstitutional.” Resp. Br. 8 (emphasis in original). Respondent then cites two cases addressed challenges to the statute on vagueness grounds. See id.; State v. Williams, 171 Wn.2d 474, 478, 251 P.3d 877 (2011); State v. Grant, 89 Wn.2d 678, 685–86, 575 P.2d 210 (1978). As Appellant noted, vagueness is different from overbreadth. See AOB 26 n. 2; Keyishian v. Board of Regents, 385 U.S. 589, 603–04, 608–10, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). And a statute’s longevity is not a guarantee of its constitutionality.

Respondent states, “The Supreme Court has held that the statutory language in question here does not regulate First Amendment rights; rather, the focus of the language is ‘on conduct other than speech.’” Resp. Br. 8 (citing Grant, 89 Wn.2d at 686); Resp. Br. 9 n. 2 (“the Supreme Court has held the language at issue here regulates conduct, not speech.”). Grant did not hold that. The Grant Court stated that in *dicta*, in response to a challenge for vagueness. Grant, 89 Wn.2d at 686.

The statute here regulates speech, so long as it is accompanied by conduct. See Williams, 171 Wn.2d at 485; AOB 25. Respondent does not acknowledge this citation, or law. Thus, the State continues to bear the burden of the statute’s justification under the First Amendment. Voters Educ. Comm. v. Pub. Disclosure Comm’n, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007). Respondent claims, “The defendant cites to multiple cases that are inapplicable to the case at hand because they deal with statutes that regulate pure speech.” Resp. Br. 9, n. 3. The cases that Respondent cites for this proposition don’t say that. Instead, they say, “The statute criminalizes pure speech. Therefore, it “ ‘must be interpreted with the commands of the

First Amendment clearly in mind.” State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004) (quoting State v. Williams, 144 Wn.2d 197, 206–07, 26 P.3d 890 (2001), which in turn is quoting Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). Respondent cites Kilburn and Watts. Resp. Br. 9 n. 3. But the idea that pure speech cases are “interpreted with the commands of the First Amendment clearly in mind” surely does not render pure speech cases “inapplicable to the case at hand.” There is no foundation—at least in Respondent’s brief—for the distinction he attempts to draw.

As Respondent correctly notes, a threshold inquiry for overbreadth is whether the statute prohibits a substantial amount of protected speech. Resp. Br. 9–10. Respondent then argues, “[t]hus, a person can violate the act without uttering a single word or engaging in expressive conduct.” Resp. Br. 10. That is not the test. The fact that a person’s First Amendment rights *might* not be infringed upon through enforcement of the statute is irrelevant. Respondent argues that the statute only prohibits speech that knowingly hinders, delays, or obstructs law enforcement officers. Resp. Br. 10, 11–12. As discussed

above, this is speech is fully protected. Supra § A.I.a. And the statute covers a substantial amount of it. See City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

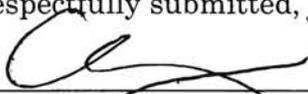
Finally, Respondent compares this case to State v. Hahn, 162 Wn. App. 885, 256 P.3d 1267 (2011), reversed on other grounds, 174 Wn.2d 126, 271 P.3d 892 (2012). In that case, the statute prohibited “offer[ing] to give or giv[ing] money or other thing of value to another to engage in specific conduct which would constitute such a crime.” Hahn, 162 Wn. App. at 900 (citing RCW 9A.28.030(1)). Respondent does not explain how Hahn is similar to the case at bar. See Resp. Br. 10–11. It is not.

B. CONCLUSION

For the foregoing reasons and for the reasons set out in his Opening Brief, Jordan respectfully requests that this Court reverse his conviction for obstructing a law enforcement officer.

DATED this 19<sup>th</sup> day of July, 2012.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67726-8-I
v.	)	
	)	
ERISTUS J.J.,	)	
	)	
Juvenile Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF JULY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DENNIS MCCURDY, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
APPELLATE UNIT	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF JULY, 2012.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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