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Court of Appeals
Division III
State of Washington
No. 32981-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Trey M.,

Juvenile Appellant.

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Words are very powerful and Trey has heard words spoken to him the last four years in school that have made him feel worthless, sad, fearful he would never belong and have any friends. ... Does this give Trey an excuse to say those words? No. But they were only thoughts in his head talking to his therapist.

RP 250 (statement of Nancy M., Trey's grandmother, at sentencing).

But on the other hand, you shouldn't be thinking that way. So that's the problem.

RP 258 (Court's statement to Trey at sentencing).

Trey M. was improperly convicted of a crime for statements he made to a therapist while working through his thoughts and feelings following a childhood of physical abuse and verbal harassment. He had never responded to his abusers with violence, instead appropriately discussing his problems in therapy.

The convictions here are invalid under both the harassment statute and the First Amendment. The State's response brief demonstrates a misunderstanding of the elements of the crime, and a misapplication of First Amendment caselaw. As indicated by the juvenile court's own statements, the convictions here amount to an unconstitutional instance of thought-policing. This Court should reverse.

B. ARGUMENT

1. The State's late-filed findings were not served on counsel and omit critical facts; this Court must review all relevant evidence in the record in light of the important constitutional rights at stake.

a. The State filed written findings late, without notice to, or service on, appointed counsel.

The juvenile court entered its verdict and disposition order on December 19, 2014, and Trey filed a notice of appeal the same day. CP 25-31. No written findings and conclusions were filed.

This Court appointed appellate counsel on December 29, 2014. *See* Acords docket, case no. 329810. Counsel filed a designation of clerk's papers and statement of arrangements on January 29, 2015. *Id.* Clerk's papers were filed February 11 and transcripts were filed March 25, 2015. *Id.*

Counsel then reviewed the record, researched the issues, and drafted the opening brief. The brief argued that the State failed to prove multiple elements of the crime, and that the convictions violated the First Amendment. *See* Br. of Appellant at 13-30. Trey did not assign error to the absence of written findings, because the record and oral ruling were sufficient for review. *See State v. Bynum*, 76 Wn. App. 262, 266, 884 P.2d 10, 12 (1994). Trey filed his opening brief on April 23, 2015.

Unbeknownst to assigned counsel, the State filed written findings very late, on April 15, 2015. CP 40-46. The State did not serve the findings on appointed counsel, or even alert appointed counsel that they had been filed. Trey's trial attorney apparently signed the findings, approving them only "as to form." CP 46.

Several months later, on July 20, 2015, the State filed a supplemental designation of clerk's papers, designating the late-filed findings. *See* Acords docket, case no. 329810.

b. The late-filed findings omit critical facts.

Material facts are missing from the written findings. As explained in the opening brief, Washington law requires consideration of the First Amendment question from the point of view of a reasonable speaker *under all of the circumstances*. *State v. Kilburn*, 151 Wn.2d 36, 44, 84 P.3d 1215 (2004); Br. of Appellant at 21-25. The State concedes this point in the response brief. Br. of Respondent at 11 (Whether a statement is a true threat is determined "in light of the entire context."). Yet, the State omitted key facts from the written findings – facts which are essential to the required totality-of-circumstances analysis.

For instance, Finding 1.2 states, "During the course of his counseling, [Trey] expressed homicidal and suicidal ideation." CP 41. Absent from this finding is the important fact that the counselor did not

report these statements to authorities. RP 25-31 (counselor's testimony);

See Br. of Appellant at 23. Other material omissions include:

- Trey was a victim of severe abuse who was participating in counseling to address his traumatic childhood (RP 246-50);
- The counselor testified that Trey's alleged plan was "not something he was going to carry out today, but that he was thinking about for the future." (RP 34);
- Trey told his counselor that he was more likely to commit suicide than to kill anyone else (RP 34-36);
- E.C.D. did not merely "express relief" that Trey was in custody by the time he found out about the alleged statements (CP 43); rather, E.C.D. specifically "felt relieved that [Trey] *couldn't fulfill the hit list.*" (RP 90);
- W.B. not only stated that he did not think Trey would hurt him, CP 44, but also stated that he came to that conclusion "right when I found out" about the alleged statements (RP 106);
- W.B. repeatedly denied that Trey ever threatened him, and did not consider Trey's statements to be threats (RP 101).

These facts are material to both the Due Process and First Amendment questions before the Court. The State's exclusion of these critical facts from the written findings does not change the analysis, and does not change the fact that State presented insufficient evidence to prove the elements of the crime. See Br. of Appellant at 13-30.

- c. This Court must carefully scrutinize the entire record to determine whether the State met its burdens under the Due Process Clause and the First Amendment.

When reviewing sufficiency-of-the-evidence claims in cases implicating pure speech, an appellate court does not simply take the written findings at face value. Rather, the Supreme Court has emphasized:

An appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech. It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more.

Kilburn, 151 Wn.2d at 49; accord *State v. E.J.J.*, 183 Wn.2d 497, 354 P.3d 815, 818 (2015) (“Given the important First Amendment rights at stake, we are required to engage in a careful review of the record ...”); see also *E.J.J.* at 819 n.8 (“the constitutional standard of review ... requires scrutiny of not only the trial court's findings, but of the entire record ...”).

The *Kilburn* Court described this heightened standard as “the rule of independent review.” *Kilburn*, 151 Wn.2d at 52. It explained:

[T]he sufficiency of the evidence question raised involves the essential First Amendment question – whether *Kilburn*'s statements constituted a “true threat” and therefore unprotected speech. We must independently review the crucial facts in the record, i.e., those which bear on the constitutional question.

Id.

Applying the rule of independent review in *Kilburn*, the Supreme Court reversed a juvenile's conviction for felony harassment because the State did not meet the strict standard of proof required for such a crime. *Id.* at 53. The same should occur here; this Court should reverse the convictions and remand for dismissal of the charges with prejudice, because the State presented insufficient evidence to satisfy due process and the First Amendment. Br. of Appellant at 13-30.

2. The convictions violate Due Process because the State presented insufficient evidence to prove felony harassment under the statute.

- a. The State failed to prove the alleged victims feared that any threat to kill would be carried out, and the response brief glosses over this element.

As explained in the opening brief, the convictions must be reversed because the State presented insufficient evidence to prove the alleged victims feared that a threat to kill would be carried out, as required under RCW 9A.46.020(1)(b). All three boys learned of the allegations after they had already been arrested and placed in detention, and all three testified they did not fear they would kill them. Although they were scared thinking about what *might* have happened had things occurred differently in the past, they did not testify that they were ever afraid that something bad *would* happen. Thus, the State presented insufficient

evidence as a matter of law to prove this element. Br. of Appellant at 15-19.

The State glosses over this failure with a one-paragraph response, apparently hoping this Court will not notice the deficiency. Br. of Respondent at 7. As to the count involving E.C.D., the State says only, "E.D. specifically testified, 'I was scared that my life could have been taken.'" *Id.* This is insufficient as a matter of law, and does not address the issue raised in the opening brief. The statute requires proof of fear "that the threat *will be* carried out." RCW 9A.46.020 (1)(b) (emphasis added). Fear that something bad could have happened in the past under different circumstances is not enough. *Id.* The State presented insufficient evidence that E.C.D. feared a threat to kill would be carried out in the future. In fact, because Trey was in custody when E.C.D. was told he was on a "hit list," E.C.D. "felt relieved that [Trey] couldn't fulfill the hit list." RP 90. Reversal is thus required on count four.¹

The State similarly ignores the requirement of fear of future harm when discussing W.B. On this count, the State responds only: "W.B. also testified that he was so scared he was physically shaking at the time.

¹ E.C.D. further testified, "I honestly don't think Trey would have done that." RP 90. He explained, "I was scared because of the hit list, but if you think about it, Trey's really - - he's really nice. I just didn't - - I don't see Trey giving me anything that - - like that." RP 91. *See* Br. of Appellant at 15-16.

Further, he was still scared months later at trial, even though [Trey] was in custody.” Br. of Respondent at 7. W.B. did testify that he was “scared” and “shaking,” but only because he was “dumbfounded at what happened” in the past – *not* because he feared future harm. RP 106. To the contrary, he stated, “I know Trey, and ... I know he wouldn’t harm me.” RP 106. W.B. felt that way “right when I found out” about the alleged statements. RP 106. Accordingly, there is no question that the State failed to meet its burden on count three. Br. of Appellant at 16-17.

Finally, as to G.G.C., the State responds only: “G.C. testified that he was “freaked out” and scared that the plan might have been carried through by [Trey].” Br. of Respondent at 7. In fact, like the other two witnesses, G.G.C. expressed fear about a hypothetical past; he did not express fear of future harm. He said he was “freaked out” because he did not know “if it actually *could have* happened.” RP 120-21 (emphasis added). G.G.C. had not been at school that day, and he was scared to think what might have happened if he had been at school. RP 121. But his only concern about *the future* was “what everyone at school would be thinking or feeling or, like, if - - like what kind of questions I might get asked about it.” RP 123. This is obviously not the type of fear contemplated by the harassment statute. Rather, to sustain a conviction

for felony harassment the State must prove the alleged victim fears that a threat to kill will be carried out.

As to that element, the prosecutor posed the following questions to G.G.C., and received the following answers:

[PROSECUTOR]: Have you ever seen Trey be confrontational or violent with anybody?

[G.G.C.]: No.

[PROSECUTOR]: Is there anything about the relationship that you had with Trey that would make you afraid that he would carry out these threats?

[G.G.C.]: No.

[PROSECUTOR]: Anything that you know about him?

[G.G.C.]: No.

RP 124. Because the State failed to prove G.G.C. feared a threat to kill would be carried out, reversal is required on count two.²

The State's concluding sentence for all three counts highlights its failure to address the issue. It notes, "the evidence amply supports the inference that the three victims subjectively felt fear." Br. of Respondent at 7. This is a straw man, because proof of a *specific type of fear* is required. Trey has always acknowledged that the boys felt fear about what might have happened in the past if Trey had not been detained. The

² The prosecutor also asked G.G.C. how he would feel "if Trey gets released," and G.G.C. said simply, "I don't know." RP 123.

point is that this is insufficient, because the statute requires proof that when the boys heard the allegations, they feared a threat to kill “will be carried out.” RCW 9A.46.020 (1)(b). The State ignores its obligation to prove this element of the crime, but due process does not permit the prosecution to avoid this requirement. The convictions for all three counts should be reversed, and the charges dismissed. Br. of Appellant at 13-19, 28-29. The Court need not reach the alternative arguments below.³

- b. The State failed to prove that any fear that did exist was caused by Trey’s words or conduct, and the response brief disregards the statute.

As noted in the opening brief, the State also failed to prove that any fear the boys felt was caused by Trey’s “words or conduct,” as required under the statute. RCW 9A.46.020 (1)(b). None of the three alleged victims testified that they heard Trey’s statements, either directly or indirectly. Nor did they testify that they had any idea the alleged statements were made to a mental health counselor during a therapy session. By the time the boys were told something, both the actual statements and their context were completely eradicated in favor of an

³ As noted in the opening brief, the fact that the counselor apparently “took the threats seriously” is of no moment because the State did not allege Mr. Heeringa was a victim. *See State v. Vidales Morales*, 174 Wn. App. 370, 382-84, 298 P.3d 791 (2013) (improper to instruct jury that it could convict if original listener feared threat against another would be carried out, where information did not name original listener as victim).

intermediary's summary statement that there was a "hit list." This is insufficient under the statute. Br. of Appellant at 19-21.

The State claims, "[Trey] provides no caselaw in support of his argument that the victims must be told, directly or indirectly, of [Trey's] statements." Br. of Respondent at 8. The State misunderstands the law. It is not for the courts to determine the elements of a crime. Rather, "[i]t is the function of the Legislature to define the elements of a specific crime." *State v. Wadsworth*, 139 Wn. 2d 724, 734, 991 P.2d 80 (2000). The Legislature sets forth these elements in statutes, not caselaw.

The statute at issue here requires proof that the defendant's "words or conduct" caused the alleged victim's fear. RCW 9A.46.020 (1)(b). Trey cited the statute, as well as caselaw holding that the plain meaning of the statutory language controls, and that to the extent the language is ambiguous, the rule of lenity applies. Br. of Appellant at 19 (citing RCW 9A.46.020(1)(b); *State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010); *State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005)). The State cites no caselaw holding that this is the rare circumstance in which the plain meaning of the statute need not be followed.

In fact, the first case the State cites reiterates the mandate of RCW 9A.46.020 (1)(b): "The second element requires that the State prove that the perpetrator by words or conduct places the target of harassment ... in

reasonable fear that the threat will be carried out.” *Vidales Morales*, 174 Wn. App. at 381(cited in Br. of Respondent at 8). This element was not proved in Trey’s case.

The State again sets up a straw man by protesting that threats may be sanctioned whether communicated directly or indirectly through a third party. Br. of Respondent at 9. Trey did not state otherwise. The problem is that Trey’s words and conduct were never communicated to the alleged victims – directly or indirectly. Br. of Appellant at 19-21. The State is thus wrong in claiming “it is not disputed that all three [alleged] victims learned of the threat made by [Trey].” Br. of Respondent at 9.⁴

The State correctly notes that Trey’s more detailed statements, taken alone, were alarming. Br. of Respondent at 9-10. But they were not made in a vacuum. Trey made these statements to a mental health professional, in a private counseling session, while stating that he would be more likely to kill himself or play video games than to kill anyone else. None of this was conveyed – directly or indirectly – to the boys. Accordingly, the State failed to prove this second element of the crime, constituting an independent basis for reversal.

⁴ Not only does Trey dispute that the boys ever learned of his actual statements or their context, he disputes that his statements constituted “threats” unprotected by the First Amendment. *See* Br. of Appellant at 21-28.

**3. The convictions violate the First Amendment because
Trey's statements were not true threats.**

- a. Trey's statements were not true threats under the reasonable-speaker standard, and the State misapplies *Kilburn* and *Schaler*.

Trey's convictions not only violate due process, they also violate the First Amendment. His statements were not true threats under the reasonable-speaker standard, because he made the statements in a private therapy session and all of the boys knew Trey to be a nice person who would not harm anyone. Br. of Appellant at 21-25.

The State acknowledges that “[a]n appellate court must make an independent examination of the whole record, so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression.” Br. of Respondent at 11 (citing *Kilburn*, 151 Wn.2d at 50). The State also agrees that whether a statement is a true threat “is determined in light of the entire context.” Br. of Respondent at 11 (citing *Kilburn*, 151 Wn.2d at 46, 48). Yet the State fails to apply the rule it acknowledges controls, instead presenting selected facts and ignoring other material evidence. Viewing “the whole record” and “the entire context,” it is clear that Trey's convictions do not pass First Amendment muster.

The primary problem with the State's argument is its failure to acknowledge that the context of these statements was that of a traumatized boy in a private counseling session. Trey had attended therapy for years to work through his thoughts and feelings. RP 10-11, 23, 247. As trial counsel noted, the context is akin to writing in a diary. RP 214. This is critical to the totality-of-circumstances analysis.

The State omits mention of other key facts that must be considered as part of the context. For instance, Trey told his counselor that he was more likely to commit suicide than to kill anyone else. RP 34-36. And he told Deputy Boyer that what he said to his therapist was "not an issue" because it was something "he probably really wouldn't do." RP 46-47, 54-55. In fact, not only would he be more likely to kill himself than to kill anyone else, but really, he "would rather just play video games." RP 65-66. All of these facts demonstrate that the State has failed to meet the strict standard required to criminalize speech.

In addition to omitting critical facts from the analysis of Trey's case, the State omits key facts from its discussion of *Kilburn*. Br. of Respondent at 12-15. The State notes that in *Kilburn*, the defendant was reading a book about the military and guns while students were laughing and chatting at the end of a school day. Br. of Respondent at 12 (citing *Kilburn*, 151 Wn.2d at 52). *Kilburn*, half-smiling, told his classmate K.J.

that he was going to bring a gun to school the next day and shoot everyone, beginning with her. *Id.* He then began giggling and told K.J. that maybe he would not kill her first. The two had known each other for two years and had never had an argument. *Id.*

But the State neglects to mention that the defendant in *Kilburn* also said, “there’s nothing an AK 47 wouldn’t solve.” *Kilburn*, 151 Wn.2d at 38-39. Nor does the State acknowledge that “the more K.J. thought about it the more she became afraid that Kilburn was serious.” *Id.* at 39.

Finally, the State does not recognize the other ways in which the statements at issue in *Kilburn* were far closer to true threats than the statements here: (1) The defendant in *Kilburn* directly told the alleged victim he was going to shoot her, whereas Trey was working through his thoughts and feelings in a counseling session; and (2) the defendant in *Kilburn* stated that he was going to take a gun to school “the next day,” whereas the counselor here stated that Trey’s alleged plan was “not something he was going to carry out today, but that he was thinking about for the future.” RP 34. Finally, the response brief neglects to mention that, as in *Kilburn*, Trey and the other students had known each other for a while and the other boys knew Trey to be nonviolent and a nice person. RP 91, 106-07, 123-24. It is inconceivable that the statements at issue

here would be considered “true threats” given that the statements at issue in *Kilburn* were not. Br. of Appellant at 22-25.

The State is also wrong in claiming that Trey’s statements are true threats under *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010). Br. of Respondent at 13-15. In *Schaler*, the Supreme Court reversed convictions for felony harassment because the jury had not been instructed on the definition of “true threat.” *Schaler*, 169 Wn.2d at 278. The Court held that double jeopardy did not bar retrial, as sufficient evidence supported the convictions. *Id.* 290-91. Like Trey, the defendant in *Schaler* spoke in a serious manner to a mental health professional and expressed a desire to kill others. *Id.* at 291. But that is as far as the similarities go. Schaler told a crisis counselor that “he had been planning to kill his neighbors for months and that he wanted to do so.” *Id.* In sharp contrast, Trey made his statements only once, and clarified that it was something “he probably really wouldn’t do.” RP 47. Trey stated that he would be more likely to kill himself than to kill others, and that he would rather play video games than kill anybody. RP 34-36, 65.

Furthermore, in *Schaler*, the defendant had previously threatened the victims with a chainsaw. *Schaler*, 169 Wn.2d at 291. The victims were so afraid Schaler would harm them that they obtained restraining orders. *Id.* Here, in sharp contrast, Trey had never threatened the boys –

let alone wielded a weapon against them. The boys stated that Trey was nice, that they never knew him to be violent, and that they did not fear he would hurt them. RP 90-91, 94, 106-07, 123-24. Thus, while sufficient evidence supported the convictions in *Schaler*, the same cannot be said here.

Perhaps most telling, W.B. repeatedly testified that he did not consider Trey's statements to be threats. RP 101. Like other facts discussed above and in the opening brief, this important fact is missing from the State's analysis. While W.B.'s characterization of the situation is not dispositive, it is certainly persuasive. After all, if W.B. did not in fact view the statements as threats, it is difficult to understand how a reasonable person in Trey's position would foresee that W.B. (and the other boys) would perceive the statements as threats.

In sum, the State did not prove a true threat under the "difficult standard" it is required to meet under the First Amendment in Washington. *Kilburn*, 151 Wn.2d at 53. For this reason, too, this Court should reverse.

- b. Trey's statements were not true threats under the subjective-intent standard, and the State misunderstands *Virginia v. Black*.

Although this Court need not reach the issue because the errors above require reversal, it is worth noting that the convictions are also invalid under the subjective-intent standard set forth in *Virginia v. Black*,

538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). Because there was no evidence that Trey made the statements to his therapist with the intent to intimidate the boys, the convictions violate the First Amendment under *Black*. Br. of Appellant at 26-28; *see also* Br. of Amicus Curiae American Civil Liberties Union of Washington.

In response, the State cites only Washington cases and reverts to the reasonable-speaker standard. Br. of Respondent at 15-16. Trey already explained in the previous argument section that his convictions are invalid under Washington's reasonable-speaker standard. But because the First Amendment is a federal constitutional provision, states must also comply with U.S. Supreme Court caselaw addressing that provision. Br. of Appellant at 26 (citing *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008)).

The State responds that "*Black* is distinguishable because the statute at issue there required the speaker to intimidate the listener, which necessitates a greater mens rea than simply putting the listener in fear." Br. of Respondent at 16. But the Supreme Court did not reverse the convictions in *Black* on statutory grounds. Indeed, the U.S. Supreme Court has no authority to construe state statutes. *Ins. Co. v. The Treasurer*, 78 U.S. 204, 208, 20 L. Ed. 112 (1870). The U.S. Supreme Court weighs in only if the application of a state statute violates the federal constitution.

See id. at 209. In *Black*, the Court reversed convictions for cross-burning with intent to intimidate because those convictions violated the First Amendment – even though the facts demonstrated that the convictions would have satisfied a reasonable-speaker (negligence) standard. *See Br. of Appellant* at 26-27.

After Trey filed his opening brief, the Supreme Court decided *United States v. Elonis*, ___ U.S. ___, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). There, the defendant was charged with multiple counts of the federal crime of communicating a threat, after he posted frightening facebook messages about how he would kill his ex-wife and others. *Id.* at 2004-07. Elonis explained that he posted the messages for “therapeutic” reasons, to help him “deal with the pain” of divorce. *Id.* at 2005. Over Elonis’s objection, the trial court gave a jury instruction on “true threat” that applied a reasonable-speaker (negligence) standard. *Id.* at 2006. Elonis was convicted of most of the charges, and he appealed on statutory and First Amendment grounds. *See id.*

The Supreme Court did not reach the First Amendment question, but reversed the convictions after holding that Due Process did not permit a construction of the statute which allowed conviction based on a mens rea of mere negligence. *Id.* at 2009-12. The Court explained:

Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct – awareness of some wrongdoing. Having liability turn on whether a “reasonable person” regards the communication as a threat – regardless of what the defendant thinks – “reduces culpability on the all-important element of the crime to negligence, and we “have long been reluctant to infer that a negligence standard was intended in criminal statutes.”

Elonis, 135 S.Ct. at 2011 (internal citations omitted); see also *United States v. Houston*, 792 F.3d 663, 667-68 (6th Cir. 2015) (reversing convictions under *Elonis*, further explaining the problems with the negligence standard, and stating, “Recognizing that Houston was speaking with his girlfriend, a jury could reason that he was venting his frustration to a trusted confidante rather than issuing a public death threat to another.”). Thus, even though the Supreme Court did not address the First Amendment question in *Elonis*, that case is persuasive authority for the proposition that Trey’s convictions are invalid. For this reason, too, this Court should reverse.

C. CONCLUSION

For the reasons set forth above and in the opening brief, Trey M. asks this Court to reverse the convictions and remand with instructions to dismiss the charges with prejudice.

Respectfully submitted this 28th day of September, 2015.

/s Lila J. Silverstein
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)

Respondent,)

v.)

TERY M.,)

Juvenile Appellant.)

NO. 32981-0-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF SEPTEMBER, 2015.

X _____ *Trey M.*

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