APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 18-30171

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

ROBERT WAGGY,
Defendant-Appellant.

Argued and Submitted July 11, 2019
Portland, Oregon

Filed September 5, 2019

Before: A. Wallace TASHIMA, Susan P. GRABER, and John B. OWENS, Circuit Judges.

Dissent by Judge TASHIMA

OPINION

GRABER, Circuit Judge:

Defendant Robert Waggy repeatedly telephoned the Mann-Grandstaff Veterans Administration Medical Center ("Center"), a Department of Veterans Affairs ("VA") facility in Spokane, Washington. Some of those calls resulted in federal charges of telephone harassment in violation of Washington

Revised Code section 9.61.230(1)(a), (b), which applies to federal land in Washington State through the Assimilative Crimes Act, 18 U.S.C. § 13. A jury convicted Defendant of two of the charges. On appeal, he argues primarily that the Washington statute violates the First Amendment as applied to his conduct. We disagree and affirm. We resolve Defendant's jury instruction claims in a memorandum disposition filed concurrently with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, a Marine Corps veteran, has an extensive history with the Center. At various times, Defendant has been barred from the premises because of his disruptive behavior and frequent threats. He was previously convicted of harassment and trespass for incidents involving the Center. Because Defendant is not allowed on the premises, he receives VA-authorized medical care through private physicians instead. The VA also restricts Defendant's contact with the Center. Defendant has one point of contact whom he is permitted to call—a "Care in the Community" Supervisor—and the Center established a phone line specifically for Defendant's use.

Defendant asserts that the VA owes him millions of dollars for various reasons and that, because the VA has failed to pay the debt, he is now the legal owner of the Center's land and facilities. Many of his telephone calls to VA employees addressed this dispute and his related threats to seize the Center by force.

In April 2016, Defendant called the Center several times in one day. Each time, he dialed the Spokane VA's 1-800 number and asked to speak to the director. Defendant was transferred to the director's office. Sandra Payne, one of the Center's executive secretaries, answered the April 2016 calls, which underlie the charged counts.

Defendant was charged with two counts of violating Washington Revised Code section 9.61.230(1)(c) (Counts 1 and 6); one count of violating section 9.61.230(1)(a), (c) (Count 2); two counts of violating section 9.61.230(1)(a), (b) (Counts 3 and 4); and one count of violating section 9.61.230(1)(b) (Count 5). Section 9.61.230(1) provides in relevant part:

> (1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
>
> (a) Using any lewd, lascivious, profane,[1] indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
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> (b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
>
> (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household;

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[1] "Profane" was not included in the jury instructions in this case.

is guilty of a gross misdemeanor . . . .

During his first call ("Count 2"), [2] Defendant demanded that the VA pay him $ 9.25 million or "get off [his] property." He threatened to come to the Center to seize the property and to "use force to defend himself." Payne testified that Defendant's threat frightened her and that he told her to "do [her] fucking job." After Payne asked Defendant to "be respectful and to keep the call professional," he screamed at Payne and called her a "fucking cunt." Payne testified that Defendant "was screaming, not just yelling. I mean, there's a difference between yelling and screaming. And he was screaming into the phone." Payne then hung up on Defendant; "I can handle yelling, I can handle screaming, but I can't handle being called names like that." Count 2 was dismissed by the magistrate judge at the conclusion of the government's case.[3]

Defendant immediately called back ("Count 3"). Payne testified:

> Payne: It's never over. He always calls back. So he called back.
>
> Question: How did you know he was calling back?
>
> Payne: His caller ID. It was the same phone number I had just hung up with. And when I

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[2] The government voluntarily dismissed Counts 1 and 6 before trial.

[3] The parties consented to having a magistrate judge conduct Defendant's jury trial.

> picked up the phone, he was just screaming, still yelling, um, just obscenities.

Payne testified that Defendant used "a lot of F bombs," such as "Fuck everything. So, to do my, do my fucking job and to fucking listen[.]" Payne also testified that, except for the obscenities, she could not understand what Defendant's words meant. Asked whether she could "make sense of what he was saying at that point," Payne responded, "I really couldn't understand him on that . . . second call"; his tone was "[b]eyond elevated." Defendant hung up on Payne. The jury found Defendant guilty of Count 3.

Defendant called back a third time ("Count 4"). He reiterated his demands for "his property" or "his money." Payne informed Defendant that she would "take a message and get it to the appropriate department." Defendant called Payne a "fucking cunt" again. Payne hung up the phone, testifying that Defendant "was so irrational on the phone, he was just screaming, like screaming, um, and it made me scared. I didn't want to talk to him any more." The jury found Defendant guilty of Count 4.

Defendant called back again. Payne did not answer the phone, testifying that she felt that "it would never end." Defendant called yet again, and Payne refused to answer for the second time. Payne then walked away from her desk, so Defendant's final two phone calls also went unanswered. Those four calls were charged collectively as "Count 5." The jury found Defendant not guilty of Count 5.

Defendant filed a motion for judgment of acquittal, arguing that Washington Revised Code section 9.61.230(1)(a) was unconstitutional as applied to his

conduct. The magistrate judge denied the motion and sentenced Defendant to five years' probation.

Defendant appealed his conviction to the district court. He argued that his conviction violated the First Amendment as applied to his conduct and that the jury instructions were misleading, overbroad, and vague. The district court affirmed. Defendant timely appeals. Reviewing de novo, *United States v. Laursen*, 847 F.3d 1026, 1031 (9th Cir. 2017), we affirm.

DISCUSSION

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "[A] law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). The right to free speech, however, "is not absolute." *Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002). Laws or policies that target conduct, but that burden speech only incidentally, may be valid. *See, e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 123-24, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (holding that the defendant had not shown that the contested policy "prohibits a 'substantial' amount of protected speech in relation to its many legitimate applications"). Additionally, there are traditional narrow carve-outs to the First Amendment, which allow Congress to restrict certain types of speech, "including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United*

States v. Stevens, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (citations omitted).

"An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). Defendant argues that section 9.61.230 is unconstitutional as applied to him because he just "wanted to talk about his medical care and the VA's unpaid bills"; "he didn't intend to—or want to—harass Ms. Payne." That characterization of Defendant's intent is untenable in light of the jury's finding (the sufficiency of which Defendant does not challenge on appeal) that he had the intent required by Washington Revised Code section 9.61.230(1): the "intent to harass, intimidate, torment or embarrass any other person." Accordingly, in deciding whether the Washington telephone harassment statute is unconstitutional as applied to Defendant's conduct, we begin with the premise that, in making the calls, he intended to harass, intimidate, torment, or embarrass Payne.

Moreover, in determining whether section 9.61.230(1)(a) reaches protected speech as applied here, we must follow the Washington courts' construction of that statute.[4] *R.A.V. v. City of St.*

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[4] Although Defendant was convicted of violating both subsection 9.61.230(1)(a) and (b), his First Amendment argument focuses on subsection 9.61.230(1)(a). Here, the jury returned a general verdict, and it is impossible to say whether the jury found Defendant guilty of subsection 9.61.230(1)(a) or (b) or both. Thus, if subsection 9.61.230(1)(a) is unconstitutional, the conviction cannot be upheld. *See*

Paul, 505 U.S. 377, 381, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). In *State v. Dyson*, 74 Wash.App. 237, 872 P.2d 1115, 1120 n.5 (1994), the Washington Court of Appeals specifically rejected the contention that the statute would prohibit calls to a public official "in which swear words are used in order to persuade the recipient to do something." The court noted that "RCW 9.61.230(1) regulates conduct implicating speech, not speech itself. Although RCW 9.61.230(1) contains a speech component, it is clearly directed against specific conduct—making telephone calls with the intent to harass, intimidate, or torment another while using" obscene or threatening words. *Id.* at 1119 (citation omitted). The "statute primarily regulates conduct with minimal impact on speech." *Id.* at 1120. Indeed, to violate the telephone harassment statute, Washington state courts have held that the defendant must "form the specific intent to harass at the time the defendant initiates the call to the victim." *State v. Lilyblad*, 163 Wash.2d 1, 177 P.3d 686, 687 (2008); *see also State v. Sloan*, 149 Wash.App. 736, 205 P.3d 172, 177 (2009) (reiterating that telephone harassment requires the specific intent to harass at the time the defendant initiates the call); *State v. Meneses*, 149 Wash.App. 707, 205 P.3d 916, 919 (2009) (same).

Hedgpeth v. Pulido, 555 U.S. 57, 58, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008) (per curiam) ("A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one."); *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (holding that, when there is a general verdict, "the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld").

The fact that subsection (b) prohibits repeated calls or calls made at an extremely inconvenient hour, even if not a single word is spoken, underscores the legislature's intention to target conduct, not speech.

United States v. Popa, 187 F.3d 672, 677 (D.C. Cir. 1999), is distinguishable. The court in *Popa* observed that, according to the defendant's testimony at trial, his "complaints about the actions of a government official were a significant component of his calls," *id.*, which is not the situation here.[5] Defendant's citations to cases concerning political speech are similarly distinguishable.

As applied here, the statute was properly cabined in accordance with the Washington courts' interpretation of it. That conclusion is made even clearer by the fact that, as the district court observed, Defendant "used the same language during the first phone call as he did during the third phone call" but was convicted only for the third call because the government failed to prove that he "formed the specific intent to harass Sandra Payne during that first phone call." In other words, the convictions are not for obscene speech, but rather for placing calls with the specific intent to harass. That Defendant included some criticism of the government does not necessarily imbue his conduct with First Amendment protection. *Cf. United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) ("[The Court] cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech'

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[5] To the extent that *Popa* is not distinguishable, its analysis is against the great weight of authority—including our own—as discussed in text below.

whenever the person engaging in the conduct intends thereby to express an idea."); *Knox v. Brnovich*, 907 F.3d 1167, 1180 (9th Cir. 2018) ("A message 'delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative' is symbolic speech protected by the First and Fourteenth Amendments." (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984))). Similarly, because of the jury's finding that Defendant intended to harass Payne, we reject Defendant's argument that he was merely criticizing a government official. *See, e.g.*, *United States v. Poocha*, 259 F.3d 1077, 1082 (9th Cir. 2001) (holding that the First Amendment protects profane criticism directed at police and, in light of the record there, rejecting the government's claim that the defendant's speech constituted "fighting words"). We hold therefore that, as applied to Defendant, section 9.61.230(1)(a) regulates nonexpressive conduct and does not implicate First Amendment concerns. *Accord Dyson*, 872 P.2d at 1119 (rejecting a constitutional challenge and holding that, "[a]lthough [Washington Revised Code section] 9.61.230(1) contains a speech component, it is clearly directed against specific conduct—making telephone calls with the intent to harass, intimidate, or torment another while using" obscene or threatening words); *see also State v. Alphonse*, 147 Wash.App. 891, 197 P.3d 1211, 1217-18 (2008) (reaffirming *Dyson*'s holding that the statute regulates conduct implicating speech, not speech itself); *State v. Alexander*, 76 Wash.App. 830, 888 P.2d 175, 179-80 (1995) (noting that "the telephone harassment

statute primarily regulates conduct, with minimal impact on speech," and that "[t]he gravamen of the offense is the thrusting of an offensive and unwanted communication upon one who is unable to ignore it").

The result that we reach is consistent with our analogous holding in *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014). In *Osinger*, the defendant was convicted of engaging in a course of harassing and intimidating conduct in violation of the federal cyberstalking statute. *Id.* 940-41. We rejected the defendant's First Amendment challenge because the statute in question "proscribes harassing and intimidating conduct" and not speech, even though speech (text messages and emails) was involved in the defendant's conduct. *Id*. at 944. We emphasized that the statute requires malicious intent, as well as harm to the victim. *Id.* Other circuits also have upheld the constitutionality of the federal cyberstalking statute because it "targets conduct performed with serious criminal intent, not just speech." *United States v. Sayer*, 748 F.3d 425, 435 (1st Cir. 2014); *accord United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015); *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012).

The requirement of a specific intent to harass—the mens rea element contained in the Washington statute—has led other circuits to uphold telephone harassment statutes against First Amendment challenges. *See, e.g.*, *Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) (upholding a conviction for telephone harassment under West Virginia law, against an as-applied First Amendment challenge, because of the intent requirement); *Gormley v. Dir., Conn. State Dep't of Prob.*, 632 F.2d 938, 941-42 (2d

Cir. 1980) (holding that Connecticut's telephone harassment statute "regulates conduct, not mere speech [because] [w]hat is proscribed is the making of a telephone call, with the requisite intent and in the specified manner"); *United States v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978) (upholding a conviction under the federal telephone harassment statute, against a First Amendment challenge, because of the intent requirement).[6]

Similarly, many state courts have upheld, against First Amendment challenges, telephone harassment statutes that require a specific intent to harass. *See, e.g.*, *State v. Brown*, 207 Ariz. 231, 85 P.3d 109, 113 (Ariz. Ct. App. 2004) (holding that statutes containing a specific intent requirement while prohibiting certain types of communication do not implicate the First Amendment because they prohibit harassment, not speech); *Gilbreath v. State*, 650 So. 2d 10, 12 (Fla. 1995) (upholding a telephone harassment statute because the provision is not directed at the communication of an opinion or idea but, instead, at the conduct of making a call with the intent to annoy, abuse, threaten, or harass the recipient); *McKillop v. State*, 857 P.2d 358, 364 (Alaska Ct. App. 1993) (holding that a statute prohibiting obscene telephone calls made with the intent to harass another did not violate the First Amendment so long as calls with a legitimate

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[6] *See also United States v. Sandhu*, 740 F. App'x 595 (9th Cir. 2018) (unpublished decision) (upholding a conviction for harassing telephone calls under 47 U.S.C. § 223(a)(1)(D) against a First Amendment challenge, because the statute regulates conduct, not speech). Although that decision is not binding on us, we find it persuasive.

communicative purpose are permitted); *People v. Taravella*, 133 Mich.App. 515, 350 N.W.2d 780, 785 (Mich. Ct. App. 1984) (holding that Michigan's statute punishing misuse of communications services targets conduct even though a speech component is involved); *State v. Camp*, 59 N.C.App. 38, 295 S.E.2d 766, 768 (N.C. Ct. App. 1982) (holding that a statute prohibiting misuse of a telephone regulates conduct rather than speech and, therefore, survives a constitutional challenge); *von Lusch v. State*, 39 Md.App. 517, 387 A.2d 306, 310 (1978) (holding that the First Amendment does not protect the use of a telephone with the specific intent to annoy and harass the recipient of the call); *People v. Smith*, 89 Misc.2d 789, 392 N.Y.S.2d 968, 970-71 (N.Y. App. Term 1977) (upholding a conviction for harassment against an as-applied constitutional challenge because the defendant's intent was to harass, not to communicate).

In sum, Washington Revised Code section 9.61.230(1)(a) requires proof that the defendant specifically intended to harm the victim when initiating the call. As applied here, that requirement ensures that Defendant was convicted for his conduct, not for speech protected by the First Amendment.

AFFIRMED.

TASHIMA, Circuit Judge, dissenting:

The majority opinion holds that the telephone harassment statute, Wash. Rev. Code § 9.61.230(1), does not implicate the First Amendment because it criminalizes conduct rather than speech—that is, making a telephone call to another person. Respectfully, because I cannot agree with that conclusion, I dissent. I am ultimately persuaded that this telephone harassment statute is unconstitutional under the First Amendment, as applied in this case, because it criminalizes speech that is—despite its vulgarity and harassing nature—public or political discourse protected by the First Amendment.

I am persuaded of this view by *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999), which reversed a conviction under a telephone harassment statute in strikingly similar circumstances. There, Popa left repeated racist insults on the answering machine of the United States Attorney for the District of Columbia. Over the course of a month, Popa made seven telephone calls, in two of which he referred to the U.S. Attorney as "a criminal, a negro," a "criminal with cold blood," and a "whore, born by a negro whore." *Id.* at 673. By any account, these would be considered harassing messages. Popa also testified that he called the U.S. Attorney's office, "among other things, to complain about having been assaulted by police officers and about the prosecutor's conduct of a case against him." *Id.* at 677. Popa was charged with violating 47 U.S.C. § 223(a)(1)(C), which makes it a crime to:

> make[ ] a telephone call or utilize[ ] a telecommunications device whether or not conversation or communication ensues, . . . with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications.

Id. at 674. Both the federal statute in *Popa* and the Washington statute here have near-identical intent requirements. The Washington statute provides:

> Every person who, with the intent to harass, intimidate, torment, or embarrass any other person, shall make a telephone call to such other person: (a) using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; . . . is guilty of a gross misdemeanor[.]").

Wash. Rev. Code § 9.61.230(1).

The D.C. Circuit concluded that the federal statute, as applied to Popa, did not survive even intermediate scrutiny because the "incidental restriction" the statute placed on speech was "greater than is essential to the furtherance of an important government interest." *Popa*, 187 F.3d at 676 (internal quotation marks omitted). The D.C. Circuit noted that "[t]he statute sweeps within its prohibitions telephone calls to public officials where the caller . . . has an intent to verbally 'abuse' a public official for voting a particular way on a public bill, 'annoy' him into changing a course of public action, or 'harass' him until he addresses problems previously left unaddressed." *Id.* at 676-77. The D.C. Circuit rejected the government's argument

that the statute was already narrowly drawn because it contained a "stringent specific intent requirement." *Id.* at 677. It held that the federal statute encompassed "public or political discourse," and the court rejected the government's position that Popa's calls had no political content, "because complaints about the actions of a government official were a significant component of his calls." *Id*.

So too in this case, complaints about the actions of a government official were a significant component of Waggy's calls, which were all made to a government office during business hours at the VA. The VA executive secretary testified that on the Count 3 and Count 4 calls, Waggy told her to "do [her] fucking job and to fucking listen," and made demands for "his property" or "his money." Based on the executive secretary's own testimony, the calls for which Waggy was convicted included complaints about the VA's actions towards him as well as his disputes with the VA over his healthcare and reimbursement issues. Despite the vulgarity and harassing nature of the calls, they, nonetheless, were complaints about the actions and inactions of the government.

The majority attempts to distinguish *Popa*, but that attempt falls far short. Here, the jury made a finding that Waggy had "the intent to harass, intimidate, torment, or embarrass any other person." In *Popa*, "the court instructed the jury that in order to convict Popa they had to find beyond a reasonable doubt that he 'had the intent to annoy, abuse, threaten or harass any person at the number called.' " *Popa*, 187 F.3d at 674. The juries in both cases implicitly found that the intent element of the respective statutes was met. Therefore, I do not

believe that *Popa* can be meaningfully distinguished from the circumstances of Waggy's case.

Section 9.61.230(1)(a) could have been drawn more narrowly, with little loss of utility to the state of Washington, by excluding from its scope those who intend to engage in public or political discourse. *See id.* at 677. Punishment of those who use the telephone to communicate a political message is not essential to the furtherance of the government's interest in protecting individuals from noncommunicative uses of the telephone. *See id.* Hence, the statute fails even intermediate scrutiny as applied to Waggy.[1] *Id.*

Because I find *Popa*'s reasoning to be persuasive, I would hold that § 9.61.230(1), as applied to Waggy, is unconstitutional and reverse his conviction. I respectfully dissent.

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[1] The Washington statute differs from the federal statute at issue in *Popa* in another respect. Section 9.61.230(1) is directly aimed at speech—not conduct—in that it criminalizes "making a telephone call" "*using* [harassing] words." (Emphasis added.) This may explain why the jury found Waggy not guilty of Count 5, which collectively charged Waggy's four phone calls which went unanswered. Since no one answered, Waggy did not have the opportunity to *use* any words, harassing or otherwise. Also, as *amici* ACLU of Washington, et al., observe, Waggy's speech does not fall within any category proscribable under the First Amendment. *See* ACLU *Amici* Br. at 9-13.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 18-30171

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT WAGGY,

Defendant-Appellant.

Argued and Submitted July 11, 2019
Portland, Oregon

Filed September 5, 2019

Before: TASHIMA, GRABER, and OWENS,
Circuit Judges.

MEMORANDUM[*]

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendant Robert Waggy stands convicted of telephone harassment in violation of Washington Revised Code section 9.61.230(1)(a), (b), which applies through the Assimilative Crimes Act, 18 U.S.C. § 13. In this disposition, we consider his claims of instructional error,[1] and we affirm.[2]

1. Instructions 8 and 9

These instructions were nearly identical to the Washington Pattern Instruction, which lists the elements of telephone harassment. The instructions made it sufficiently clear that the government was required to prove that, on April 19, 2016, Defendant called Sandra Payne with the specific intent to harass her.

2. Response to Jury's Note

The fact that the jury asked a question concerning the instructions does not, without more, demonstrate that the instructions were inadequate. The court had discretion to refer the jury to the instructions because those instructions correctly stated the law. Arizona v. Johnson, 351 F.3d 988, 994 (9th Cir. 2003).

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[1] We review de novo whether a jury instruction misstates elements of the offense. United States v. Shipsey, 363 F.3d 962, 966 n.3 (9th Cir. 2004). We review for abuse of discretion the precise formulation of instructions. United States v. Dixon, 201 F.3d 1223, 1230 (9th Cir. 2000). Finally, we review for plain error when a defendant failed to object in the trial court. Jones v. United States, 527 U.S. 373, 386-88, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).

[2] We resolve Defendant's First Amendment claim in an opinion filed this date.

3. Instruction 11

At trial, Defendant objected on the ground that the statute reached constitutionally protected speech, a claim that we resolve in the opinion. His current claim, that Instruction 11 defined terms vaguely or too broadly, does not rise to the level of plain error.

AFFIRMED.

TASHIMA, Circuit Judge, abstaining:

Because, as stated in my dissent from the majority opinion, I would reverse Waggy's conviction on First Amendment grounds, I would not reach the issues addressed by the majority's Memorandum. I therefore abstain from joining in the Memorandum.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:17-CR-00212-SAB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT M. WAGGY,

Defendant-Appellant.

Filed: July 30, 2018

ORDER AFFIRMING CONVICTION

This matter comes before the Court on Defendant's Notice of Appeal, ECF No. 166. Defendant Robert Waggy appeals his conviction under Washington's telephone harassment statute, Wash. Rev. Code § 9.61.230(1)(a).

The Court held a hearing on July 12, 2018 in Spokane, Washington. Ben Flick and John McEntire appeared on behalf of Defendant, who was present in the courtroom, and Timothy Ohms appeared on behalf of the Government. The Court took the matter under advisement.

After careful consideration of the parties' briefing and oral presentation, the Court affirms Defendants conviction.

FACTUAL BACKGROUND[1]

Defendant, a United States veteran, began visiting the Mann-Grandstaff Veterans Administration Medical Center ("MGVA") in Spokane, Washington, in 1991, in an effort to get help with his service-related medical issues. And for a number of years, Defendant received his treatment at the MGVA. Then, on several occasions between 2003 and 2015, the Disruptive Behavioral Committee ("DBC") at the MGVA determined Defendant's behavior warranted a restriction on his ability to continue receiving any medical care at the MGVA. The MGVA authorized Defendant to receive care in the community. This allowed Defendant to receive medical treatment from doctors outside of the MGVA, and then be reimbursed for the cost of authorized medical services.

There were issues with this reimbursement process that, according to Defendant, left him in significant debt. As a result, Defendant began contacting the MGVA to discuss his healthcare and need for reimbursement of medical expenses. This case arises from a series of phone calls made by Defendant to the MGVA.

On April 19, 2016, Defendant called the MGVA and asked to speak to the director to discuss his healthcare and "for the reimbursement that [he] was

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[1] Unless otherwise indicated, the facts recounted here are taken from Defendant's trial court transcript (TR 1-438).

owed for money that the [MGVA] owed [him] for various things, including medical bills that [he had] to pay out of pocket." TR 258. Instead of speaking with the director, Defendant's phone call was transferred to the director's secretary's office. Defendant spoke with one of the director's secretaries, Sandra Payne.

First Phone Call

During the first phone call, Defendant identified himself, stated that the MGVA needed to pay him $9.25 million dollars, and demanded to speak with the director. Defendant stated that if he didn't get his money "he would show up to the property." Sandra Payne responded by telling Defendant that he was not allowed on the MGVA property, and that if he came to the property she would call the police.

Defendant responded by yelling obscenities at Sandra Payne. When Sandra Payne told Defendant to be respectful, Defendant called her vulgar names. Sandra Payne then hung up the phone.

Second Phone Call

Defendant immediately called back and, again, began yelling obscenities at Sandra Payne and calling her vulgar names. Then Defendant hung up the phone.

Third Phone Call

Defendant called back a third time and reiterated that all he wanted was his property or his money. When Sandra Payne responded by telling Defendant that she would take his message, Defendant called

her vulgar names once again. Again, Sandra Payne hung up the phone.

Unanswered Phone Calls

Defendant called back four times, but Sandra Payne refused to answer any of his calls.

PROCEDURAL HISTORY

On November 18, 2016, the United States charged Defendant with telephone harassment in violation of Wash. Rev. Code § 9.61.230. ECF No. 1. The United States later filed a Second Amended Information charging Defendant with six counts of telephone harassment. ECF No. 83. Magistrate Judge Rodgers dismissed Counts One and Six, at the Government's request. ECF No. 104. The remaining counts pertained to the phone calls between Defendant and Sandra Payne. Defendant took these charges to trial.

Jury Trial

Defendant's jury trial before Judge Rodgers started on August 7, 2017. ECF No. 107. At the end of the Government's case-in-chief, Defendant moved for a judgment of acquittal. Judge Rodgers granted Defendant's motion as to Count Two of the Second Amended Information; the first phone call with Sandra Payne. Judge Rodgers found the Government failed to put forward any evidence to show Defendant made the first phone call with the specific intent to harass Sandra Payne.

Counts Three, Four, and Five were submitted to the jury. Judge Rodgers instructed the jury as follows:

Instruction No. 8[2]

Mr. Waggy is charged in Count Three of the Second Amended Information with Telephone Harassment, in violation of 18. U.S.C. § 13 and Revised Code of Washington § 9.61.230(1)(a), (b). This count pertains to the second completed call to Sandra Payne on April 19, 2016. In order for Mr. Waggy to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, on or about April 19. 2016, Mr. Waggy made a telephone call to another person: to wit, Sandra Payne;

Second, that at the time Mr. Waggy initiated the phone call, he intended to harass, intimidate, torment, or embarrass that other person;

Third, that Mr. Waggy used lewd, lascivious, indecent, or obscene words or language in the telephone call, or that Mr. Waggy called repeatedly; and

Fourth, the phone call was made or received in the Eastern District of Washington within the territorial jurisdiction of the United States.

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[2] Jury Instruction Nos. 8, 9 and 10 are identical, except that Instruction No. 8 pertains to the second phone call to Sandra Payne, and Instruction No. 9 pertains to the third phone call to Sandra Payne. Instruction No. 10 pertains to the four unanswered phone calls to Sandra Payne. ECF No. 180 at 11-12.

> The telephone call considered for Count Three must be different form the telephone call(s) considered for Count Four or Five.

ECF No. 180 at 10.

Jury Instruction No. 11 defined the terms of the statute, which included the following definition for the term "indecent": not decent, such as: grossly improper or offensive, unseemly, inappropriate. ECF No. 180 at 13.

Defendant objected to Instruction Nos. 8, 9, and 10 on First Amendment grounds, and objected to Instruction No. 11 in its entirety.[3] Judge Rodgers overruled Defendant's objections, and submitted to the jury the instructions above.

During the deliberation period, the jury asked the Judge Rodgers the following three questions:

(1) Re: Instruction No. 8, line 8: Should this be interpreted as, one, Mr. Waggy specifically intended to call Sandra Payne or Mr. Waggy happened to speak with Sandra Payne?

(2) Re: Instruction No. 8, line 10: Should the statement, 'that other person,' be interpreted as specifically Sandra Payne or, two, whoever happened to answer the phone?

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[3] "[W]e would take exception to all of the definitions that were proposed by the Court." TR 350.

(3) Re: Instruction No. 8, Line 8: should 'another person' be interpreted as any other human being or a specific person?

Judge Rodgers responded by advising the jury to re-read the jury instruction. The jury found Defendant guilty of Counts Three and Four, and not guilty of Count Five. ECF No. 114. Judge Rodgers sentenced Defendant to a five-year term of probation. ECF No. 167. Defendant timely appealed.

STANDARD

The scope of appeal from a magistrate court to a district court is the same as in an appeal to the court of appeals from a district court. Fed. R. Crim. P.58(g)(2)(D). A trial court's findings of fact are reviewed for clear error. *United States v. Kimbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005). Issues of law are reviewed *de novo. Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 573 (9th Cir. 1995). The constitutionality of a statue is reviewed *de novo. U.S. v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010).

DISCUSSION

Defendant challenges his conviction on several grounds, the first of which rests on the First Amendment. Defendant argues that Washington's telephone harassment statute violates his First Amendment right to petition the government for a redress of grievances. Second, Defendant contends the jury instruction were unconstitutionally overbroad and vague. Finally, Defendant argues the jury instructions failed to correctly recite the elements of Washington's telephone harassment statute, and Judge Rodgers failed to clarify for the

jury that, for Defendant to be found guilty, he had to specifically intend to harass Sandra Payne.

I. Whether Wash. Rev. Code § 9.61.230 Violates Defendant's First Amendment Right to Petition the Government.

Defendant argues Washington's telephone harassment statute infringes upon his rights under the First Amendment. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002). Relevant to Defendant's argument is the Petition Clause of the First Amendment, which guarantees "the right of the people . . . to petition to the Government for a redress of grievances." *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

The primary issue on appeal is whether Defendant was convicted for his *speech*; or whether he was convicted for *the act* of calling Sandra Payne, with the specific intent to "harass, intimidate, torment or embarrass," by means of "lewd, lascivious, profane, indecent, or obscene words or language." Wash. Rev. Code § 9.16.230(1)(a). The Court finds the Washington's telephone harassment statute prohibits conduct, not speech.

Washington's telephone harassment statute prohibits an individual from calling another "with the intent to harass, intimidate, torment or embarrass," by means of "lewd, lascivious, profane, indecent, or obscene words or language." Wash. Rev. Code § 9.16.230(1)(a). To satisfy the intent

requirement, the prosecution must prove that a defendant formed the intent to harass the victim at the time the defendant initiates the call to the victim. *State v. Lilyblad*, 163 Wash.2d 1, 13 (2008).

Washington courts have repeatedly held that, due to this intent requirement, the statute criminalizes conduct, not speech. *State v. Alphonse*, 147 Wash. App. 891, 903-04 (2008); *State v. Alexander*, 76 Wash. App. 830, 837 (1995); *State v. Dyson*, 74 Wash. App. 237, 243 (1994). Federal courts have also upheld the constitutionality of telephone harassment statutes in other jurisdictions on similar grounds. *Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988); *Gromley v. Dir., Conn. State Dep't of Prob.*, 632 F.2d 938, 941 (2d Cir. 1980).

Alphonse is particularly persuasive, as the defendant in that case also argued Washington's telephone harassment statute violated his First Amendment right to petition the government. In *Alphonse*, an Everett police officer was called to investigate a complaint made against the defendant. 147 Wash. App. at 897. The defendant was not satisfied with the way the investigation was handled, and began emailing and calling the Everett police officer. *Id.* The defendant left the officer several voicemails, including ones in which he described sexual acts he wished to perform on the officer's wife. *Id.* The defendant was charged and convicted of two counts of telephone harassment. *Id.* at 898.

The defendant appealed on grounds similar to those argued in the present case. He argued that he made the calls to the police officer in his official capacity as a police officer, and that the messages

left on his police department voicemail were primarily complaints. *Id.* at 901. As such, the defendant claimed that his conviction violated his First Amendment right to petition a government official for redress of grievances. *Id.* at 900.

The Washington Court of Appeals disagreed.

> Applying the statute here did not violate Alphonse's First Amendment rights. While Alphonse may have been legally voicing disapproval about the way in which Meyers handled the investigation, once he used speech to harass, intimidate, torment or embarrass Meyers, his conduct became criminal. . . . Thus, prosecuting him for making such calls did not violate his First Amendment right to petition the government to redress grievances.

Id. at 902.

The same can be said about Defendant's actions in this case. Defendant has a First Amendment right to petition the MGVA for its alleged failure to reimburse his medical expenses, or its alleged failure to provide Defendant the medical care to which he may be entitled. However, the moment Defendant called the MGVA with the specific intent "harass, intimidate, torment or embarrass" Sandra Payne, by means of "lewd, lascivious, profane, indecent, or obscene words or language," Defendant's conduct became criminal.

Defendant's trial demonstrates how Washington's telephone harassment statute criminalizes conduct, not speech. After the Government concluded its case-in-chief, Defendant moved for a judgment of

acquittal on all Counts. Judge Rodgers granted Defendant's motion and dismissed only Count Two—the first phone call. Notably, Defendant used the same language during the first phone call as he did during the third phone call. Yet, Judge Rodgers dismissed Count Two because the Government failed to satisfy its burden of proving Defendant formed the specific intent to harass Sandra Payne during that first phone call. Thus, contrary to Defendant's assertion, his conviction does not rest solely on foul language.

Accordingly, the Court finds Wash. Rev. Code § 9.16.230 does not violate Defendant's First Amendment rights because the statute prohibits conduct, not speech.

II. Whether the Definition of the Term "Indecent" Renders the Statute Unconstitutionally Overbroad or Vague.

Washington's telephone harassment statute prohibits calling another person with the specific intent to "harass, intimidate, torment or embarrass," by use of "lewd, lascivious, profane, *indecent*, or obscene words or language." Wash. Rev. Code § 9.16.230(1)(a) (emphasis added). Defendant argues Judge Rodgers committed reversible error by defining the term "indecent" as "not decent, such as: grossly improper or offensive; unseemly, inappropriate." Defendant asserts this definition rendered the statute's application unconstitutionally overbroad and vague.

a. Overbroad

"[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Defendant argues that speech which is "unseemly" or "inappropriate" sweeps a substantial amount of protected speech within statute's prohibition because it applies to speech that might simply offend a juror's sensibilities. The Court disagrees.

While "indecent" speech receives some level of constitutional protection, *see Sable Comm'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 131 (1989), "the statute's impact on 'indecent' speech is not problematic because the intent element sufficiently ensures that a substantial amount of protected expression is not deterred." *Dyson*, 74 Wash. App. at 244. For that reason, the Court finds the statute is not unconstitutionally overbroad.

b. Vagueness

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Defendant argues that whether language is "unseemly" or "inappropriate" is too subjective to allow for adequate notice or fair enforcement of the statute. The Court disagrees and

finds the element of specific intent serves to defeat Defendant's vagueness challenge. *See Alphonse*, 147 Wash. App at 908-09; *Alexander*, 76 Wash. App at 842-43 (1995).

III. Whether Jury Instruction Nos. 8 and 9 Fail to Properly Recite the Elements of Washington Telephone Harassment.

Defendant's final argument rests on Judge Rodgers' formulation of Jury Instruction Nos. 8 and 9. A trial court's formulation of jury instructions is reviewed[4] for abuse of discretion. *U.S. v. Garcia-Rivera*, 353 F.3d 788 (9th Cir. 2003). "In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation." *United States v. Frega*, 179 F.3d 793, 806 n.16 (1999). "A single instruction is not viewed in isolation, but in the context of the overall charge." *United States v. Harrison*, 34 F.3d 886, 889 (9th Cir. 1994).

Defendant takes issue with the first two elements of Jury Instruction Nos. 8 and 9. The instructions provide that, for Defendant to be found guilty of telephone harassment, the Government must prove:

> First, on or April 19, 2016, Mr. Waggy made a telephone call to *another person*: to wit, Sandra Payne;

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[4] The Court finds Defendant preserved this issue for appeal. *See United States v. Pineda-Doval*, 614 F.3d 1019, 1025 (9th Cir. 2010). Thus, the plain error standard does not apply.

> Second, that at the time Mr. Waggy initiated the phone call, he intended to harass, intimidate, or embarrass *that other person*.

ECF No. 180 at 10, 11 (emphasis added). Defendant argues that by not using "Sandra Payne" throughout the instructions, the jury was left to guess who the victim needed to be.

The Court disagrees and finds that, when read in their entirety, Jury Instruction Nos. 8 and 9 identify who the victim needed to be. As used in the jury instructions, the terms "another person" and "that other person" refer to the same person—Sandra Payne. Additionally, Jury Instruction No. 8 (Count Three) directs the jury to focus on the second completed call to Sandra Payne on April 19, 2016, and instructs the jury that "the telephone call considered for Count Three must be different from the telephone call(s) for Count Four and Five." ECF No. 180 at 10. Thus, the Court finds the jury instructions properly identified for the jury who the victim needed to be.

The Court also finds the trial court's instructions correctly recited the elements of Washington telephone harassment. Accordingly, Judge Rodgers acted within his discretion by directing the jury to re-read the jury instructions. *See Crowley v. Epicept Corp.*, 883 F.3d 739, 750 (9th Cir. 2018).

CONCLUSION

For the foregoing reasons, Defendant's conviction is affirmed.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's conviction is **AFFIRMED**.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order, furnish copies to counsel and to Magistrate Judge John T. Rodgers, and close this file.

DATED this 30th day of July 2018.

/s/ Stanley A. Bastian
Stanley A. Bastian
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA

v.

ROBERT M. WAGGY

Filed: November 16, 2017

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16PO00198-JTR-1

USM Number: NONE

Daniel Noah Rubin
Defendant's Attorney

☐

☐

THE DEFENDANT:

☐ pleaded guilty to count(s) 3 and 4 of the Second Amendment Information

☐ pleaded nolo contendere to count(s) ______ which was accepted by the court.

☒ was found guilty on count(s) 3 and 4 of the Second Amended Information after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 13 and RCW 9.61.230(1)(a), (b)	Telephone Harassment	11/23/16	3, 4s

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2 and 5 of the Second Amended Information

☒ Count(s) 1 and 6 ☐ is ☒ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for his district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/14/2017
Date of Imposition of Judgment

/s/
Signature of Judge

The Honorable John T. Rodgers
Magistrate Judge, U.S. District Court
Name and Title of Judge

11/16/2017
Date

DEFENDANT: ROBERT M. WAGGY
CASE NUMBER: 2:16PO00198-JTR-1

PROBATION

You are hereby sentenced to probation for a term of: 5 year(s)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance, including marijuana, which remains illegal under federal law.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

4. ☐ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were

convicted of a qualifying offense. (*check if applicable*)

6. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. (*check if applicable*)

8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.

9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.

10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ROBERT M. WAGGY
CASE NUMBER: 2:16PO00198-JTR-1

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must be truthful when responding to the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where

you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. ~~You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full time employment you must try to find full time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.~~

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly

communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _______________ Date ________

DEFENDANT: ROBERT M. WAGGY
CASE NUMBER: 2:16PO00198-JTR-1

ADDITIONAL PROBATION TERMS

1. You are to remain in home detention Monday through Thursday for the first consecutive 12 weeks of your term of probation. You are not to leave your home for any reason other than for medical emergency. Home confinement does not include the curtilage or property surrounding your home.

2. You are only permitted to contact the Mann-Grandstaff VA Medical Center through individuals and in a fashion approved by your supervising probation officer. You are not to contact any employee or member of the Mann-Grandstaff VA Medical Center without the prior express authorization of your supervising probation officer. You are not to be on the premises of the Mann-Grandstaff VA Medical Center.

3. You shall not consume alcohol.

4. You are to submit to mental health counseling at the direction of your supervising probation officer.

5. You are not permitted to have contact with the victim in this case, Sandra Payne, for any reason.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:16-PO-00198-JTR-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT M. WAGGY,

Defendant.

ORDER MEMORIALIZING RULING ON MOTION

This matter came before the Court for hearing pursuant to Defendant's FED. R. CRIM. P. 29 Motion and Motion for Acquittal. ECF No. 124. This Court held a hearing on the motion on September 26, 2017. Defendant was present, out of custody, with Assistant Federal Defender Benjamin Flick and Assistant Federal Defender Daniel N. Rubin. Assistant United States Attorney Timothy J. Ohms represented the United States.

Defendant's Rule 29 motion is directed to the sufficiency of the evidence in Count 3, specifically whether at the close of the government's evidence there was sufficient evidence for a finder of fact to determine beyond a reasonable doubt that Defendant

violated the statute. Defendant argues that his use of the "F word" is protected speech, and cannot be punished as criminal conduct.

Defendant's separate motion for judgment of acquittal on Counts 3 and 4 similarly sounds in the right of free speech, and urges the Court to find that both Defendant's vocabulary and the opinions espoused were constitutionally protected, and that therefore the First Amendment prohibits using these statements to support a criminal conviction.

This is an assimilated crimes case. Accordingly the Court has considered the Wash. Rev. Code § 9.61.230, which is the "telephone harassment" statute defendant is charged with violating. The Court has also considered the evidence presented to the jury at trial, and the briefs and argument of counsel. The Court has previously, and again here, notes that the statute does not punish speech *per se*, but rather *conduct* and *intentions* which may be, but are not required to be, evidenced by spoken words.

Accordingly Defendant's First Amendment arguments must fail. The Court finds that the evidence regarding Count 3 of the Second Amended Information is sufficient for a jury to find guilt beyond a reasonable doubt, and is not Constitutionally infirm. Wash. Rev. Code § 9.61.230 is not unconstitutional as applied to Defendant.

IT IS ORDERED, that Defendant's motion, **ECF No. 124**, is **DENIED**.

DATED October 2, 2017.

/s/ ____

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:16-PO-0198-JTR-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT MARK WAGGY,

Defendant.

VERDICT FORM

COUNT THREE

WE, THE JURY in the above-captioned case, find the Defendant ROBERT MARK WAGGY __Guilty______ (Not Guilty / Guilty) of the offense of Telephone Harassment as charged in Count (3) Three of the Second Amended Information.

Dated August 9th, 2017 ____________________
Presiding Juror

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:16-PO-0198-JTR-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT MARK WAGGY,

Defendant.

VERDICT FORM

COUNT FOUR

WE, THE JURY in the above-captioned case, find the Defendant ROBERT MARK WAGGY __Guilty______ (Not Guilty / Guilty) of the offense of Telephone Harassment as charged in Count (4) Four of the Second Amended Information.

Dated August 9th, 2017

____
Presiding Juror

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:16-PO-0198-JTR-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT MARK WAGGY,

Defendant.

VERDICT FORM

COUNT FIVE

WE, THE JURY in the above-captioned case, find the Defendant ROBERT MARK WAGGY Not Guilty (Not Guilty / Guilty) of the offense of Telephone Harassment as charged in Count (5) Five of the Second Amended Information.

Dated August 9th, 2017 ____________________
Presiding Juror

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:16-PO-0198-JTR

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT M. WAGGY,

Defendant.

ORDER REGARDING MOTIONS IN LIMINE, MOTIONS TO DISMISS, AND MOTIONS TO EXCLUDE

THIS MATTER came before the Court on July 24, 2017, for a pretrial conference. Defendant was present and represented by Assistant Federal Defender Benjamin Flick and Assistant Federal Defender Daniel N. Rubin. Assistant U.S. Attorney Timothy J. Ohms represented the United States.

BACKGROUND

Defendant was charged by Amended Information[1] on November 23, 2016 with a violation of 18 U.S.C.

[1] Defendant was later charged via Second Amended Information in ECF No. 83 on July 27, 2017, after this hearing concluded.

§ 13 and Wash. Rev. Code § 9.61.230. In order to establish a violation of Wash. Rev. Code § 9.61.230, the United States must prove the following elements beyond a reasonable doubt at trial: (1) that Defendant made a telephone call to any other person with the intent to harass, intimidate, torment, or embarrass said person; and (2) in making this call, Defendant used any lewd, lascivious, profane, indecent, or obscene words or language, or suggested the commission of any lewd or lascivious act; or anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or threatened to inflict injury on the person or property of the person called or any member of his or her family or household; and (3) that Defendant was within the Eastern District of Washington while engaged in the prohibited conduct.

DEFENDANT'S MOTIONS TO DISMISS

A. Failure to State Offense

Defendant moves this Court to dismiss the case based on an alleged fatal flaw in the charging document[2]. ECF No. 15. Defendant argues that the charging statute, Wash. Rev. Code § 9.61.230(1), requires that Defendant be charged with forming the specific intent to harass a *specific* individual, not a general category of persons (i.e. "employees"). Defendant also argues that this lack of specificity violates FED. R. CRIM. P. 7(c)(1) which requires an information to be a plain, concise, and definite

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[2] Defendant erroneously states the date is November 18, 2017 when the correct date of the Amended Information was **November 23, 2017**.

written statement of the essential facts constituting the offense. Finally, Defendant argues that the categorical reference to "employees" instead of specific persons raising double jeopardy concerns.

The United States responds that the phrase used in the information is identical to language that was used in jury instructions in a lower court case that was later upheld as constitutionally sufficient by an en banc review of the Washington State Supreme Court. As to the other concerns raised by Defendant, the United States suggests that if this Court finds it necessary, it can direct the government to file a bill of particulars pursuant to FED. R. CRIM. P. 7(f). The United States argues that this is the proper remedy, not a dismissal of the Information.

Defendant replies that a bill of particulars would not cure the defects in the Information and requests that, at a minimum, this Court direct the United States to amend the Information to identify the specific people in separate counts.

Under Wash. Rev. Code § 9.61.230, "the person called must be the same person threatened." *State v. Lilyblad*, 177 P.3d 686, 689 (Wash. 2008) (en banc). The Washington State Supreme Court has determined that the proper interpretation of the statute requires that "regardless of how the intent is carried out, the intent to harass must have formed at the same time when the decision is made to use the telephone." *Id.* at 691. The purpose behind this logic is that if a call is accepted by the recipient and legitimate conversation ensues, then the call itself is not unwanted nor intrusive and thus is not subject to the kind of conduct contemplated by the statute. *Id.*

In *State v. Sloan*, the Washington Court of Appeals, Division 2, had the occasion to consider the sufficiency of an information charging a defendant with the language "did make a telephone call to Anna Sloan and/or Kandice Shulte." 205 P.3d 172, 175 (Div. 2 2009). The Court found that information as written contained all essential elements of the statute and the facts supporting those elements and was therefore not constitutionally defective.

The United States charged Defendant via Second Amended Information on July 27, 2017, after this hearing concluded but before the Court issued its ruling. ECF No. 83. Therefore, **IT IS ORDERED**, that the motion, **ECF No. 48**, is **DENIED as moot**. The Second Amended Information specifies the individuals allegedly called by Defendant, by their first and last initial. The Second Amended Information is adequate if it sufficiently identifies the specific alleged victims, albeit outside of the public record.

B. Violation of First Amendment

Defendant requests this Court dismiss the Information against him with prejudice, alleging that the United States is infringing on Defendant's First Amendment rights by charging him for calls made during business hours to a business, not to individuals in their homes, as contemplated by the statute. Defendant asserts that the government's right to control speech in the manner of the statute as issue is limited to the home, where an individual's right to privacy is paramount. Defendant further argues that an expansion of application of this statute to the business sector would result in a

dangerous precedent for the future and may deter veterans from complaining about substandard medical care to their sole healthcare provider.

The United States responds by defending the constitutionality of the statute and asserting a distinction between "harassment" and "speech." The United States relies on *State v. Dyson*, in which the Washington Court of Appeals upheld this statute against an overbreadth challenge, reasoning that the statute regulated conduct, not regulating speech itself. The United States also distinguishes the present case from the case cited by Defense in *City of Everett v. Moore*, 683 P.2d 617 (Div. 1 1984). The United States argues that *Moore* is far removed in content from the case at bar and should not bear on this Court's analysis.

Defendant replies that the United States has failed to show that VA employees have a legitimate expectation of privacy in the workplace. Defendant argues that without a privacy interest, the attempted regulation of speech by the United States violates Defendant's First Amendment Rights.

The motion to dismiss, **ECF No. 47**, is **DENIED**. The telephonic communication alleged in this case is not in a public forum. This characterization justifies the government's interest in regulating the speech in question. First, this is an assimilated crimes charge, meaning that it can only be charged if it is a crime under the law of Washington, and Washington courts have determined telephone conversations to be private. *See City of Seattle v. Huff*, 767 P.2d 572 (Wash. 1989) (en banc). Second, the United States Supreme Court has said that the First Amendment

does not make property "public" simply because it is owned or controlled by the government, nor does the government intend to create a public forum when the nature of the property is inconsistent with expressive activity. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Finally, the words alone are not adequate for conviction, they must be uttered with the specific intent to "harass intimidate, torment or embarrass," and thus the statute punishes the conduct, not the words themselves.

DEFENDANT'S MOTIONS IN LIMINE

A. Undisclosed Evidence

Defendant[3] requests that, pursuant to FED. R. CRIM. P. 16, the Court exclude the admission of any evidence disclosed by the United States to Defendant after the May 1, 2017 discovery deadline. Defendant argues that there is insufficient time to investigate any newly disclosed evidence this close to trial.

The United States responds that its duty under FED. R. CRIM. P. 16 is a continuing duty to disclose evidence promptly. The United States further responds that this rule provides enough flexibility to allow the government to continue its investigation so long as any material evidence that results is promptly disclosed to the opposing party. The United States suggests that a continuation of the trial date rather than exclusion of evidence is the more appropriate remedy.

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[3] Defendant incompletely cites to a case named United States v. Hernandez-Meza. The full cite is **720 F.3d 760**, 768-69 (9th Cir. 2013).

FED. R. CRIM. P. 16 generally provides that parties adequately and timely notify the opposing party of evidence they seek to use in the upcoming trial. A violation of this notice requirement may be material or immaterial, willful or unintentional, and the remedies for violation of the rule depend on these and other circumstances. Where the violation is unintentional, Rule 16 allows a Court to "order a violating party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002) (internal quotes omitted). Exclusion, on the other hand, is the appropriate remedy for a violation where "the omission was willful and motivated by a desire to obtain a tactical advantage." *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 415 (1988)).

Here, Defendant is requesting for a blanket order prohibiting the admission of evidence not yet disclosed. This request appears contrary to the policy of Rule 16 because it circumvents the notice element of the Rule and does not provide the United States time to comply or not with the actual requirements of the Rule.

Therefore, the motion, **ECF No. 49**, is **DENIED with leave to renew**, as it is premature. Should specific, recently disclosed evidence be offered and objected to, the Court will rule at that time, in the context of circumstances then presented.

B. Criminal History

Defendant requests that, should he testify at trial, that all three of his prior felony convictions be excluded under FED. R. EVID. 609(a)-(b). Defendant argues that the 2008 harassment conviction, though it falls within the 10 year "lookback" period, should be excluded because the United States cannot show under the Ninth Circuit's five factor test that the probative value outweighs its prejudicial effect. Defendant further argues that his 2005 harassment threat to kill conviction and his 2000 rape of a child and child molestation convictions should be excluded because they fall outside of the 10 year lookback period and their prejudicial effect significantly outweighs their probative value.

The United States responds that it will seek to use the 2009 and 2005 harassment convictions, but not the 2000 rape and molestation convictions, if the Defendant takes the stand. The United States argues that for both convictions, the probative value outweighs the prejudicial effect. The United States further argues that these convictions would be admissible under FED. R. EVID. 404(b) and such admission would mitigate any prejudicial effect. Finally, while the United States agrees not to offer the 2000 convictions for rape and molestation of a child, they would still seek permission to admit the fact that Defendant is a convicted felon for impeachment purposes.

Defendant replies by asserting that the United States still cannot show that a balance of the five factor test weighs in favor of admission. Further, Defendant raises the concern that admission of these

convictions will lead a jury to convict on the theory of "he did it once, he did it again" which would result in a miscarriage of justice.

Under FED. R. EVID. 609(a)(1)(B), a testifying defendant's character for truthfulness may be impeached by criminal conviction if the conviction was for a felony, no older than ten years, and the probative value of the evidence outweighs its prejudicial effect to that defendant. The Ninth Circuit employs a five factor test for determining the probative value versus the prejudicial effect of such convictions. *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004) Courts are directed to consider and balance the following: (1) the impeachment value of the prior crime; (2) the temporal relationship between the conviction and the defendant's subsequent criminal history; (3) the similarity between the past and the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue. *Id.*

Where a balance of these factors results in a "close call," the Ninth Circuit has recommended courts err on the side of excluding the conviction, with "a warning to the defendant that any misrepresentation of his background on the stand will lead to admission of the conviction for impeachment purposes." *United States v. Teall*, 2015 WL 3948509, 4 (D. Idaho, 2015) (citing *United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979) *overruled on other grounds in Luce v. United States*, 469 U.S. 38 (1984)).

Because of the nature of the instant charges and the similarity of the prior harassment convictions, the Court finds the prejudicial effect outweighs the

probative value. Therefore, the 2005 and 2008 convictions will not be admitted for impeachment if Defendant chooses to testify. Further, because of the age and the salacious nature of the Child Rape and Molestation convictions, these will not be admitted for impeachment if Defendant testifies.

The government is permitted to impeach Defendant, if he testifies, by asking if he has been convicted of "a felony." This ruling is subject to modification if Defendant puts his criminal record in issue.

The Defendant's motion, **ECF No. 50**, is **GRANTED**.

C. Rule 404(b) Evidence

Defendant requests that, pursuant to FED. R. EVID. 404(b), the Court preclude any evidence of Defendant's prior convictions and of prior exchanges between Defendant and VA personnel: specifically, (1) Defendant's 2005 harassment conviction; (2) Defendant's 2008 harassment conviction; (3) Threatening statements made by Defendant at a private physician's office in 2012; (4) June 2012 Statements made to VA personnel; (5) June 2012 letter from Defendant to US Attorney Mike Ormsby; (6) June 2012 call to VA; (7) August 2012 call to VA; (8-10) Voicemails left with VA; and (11) a November 17, 2016 telephone call to VA. Defendant's primary argument is that these facts are being offered to prove propensity and that the risk of prejudice to Defendant by these facts is extremely high.

The United States responds that it offers this "other act" evidence to provide context and to be able

to cogently present its theory of the case. Primarily, the United States argues that this other act evidence is necessary to show intent, motive, and knowledge that Defendant's intent was to harass members of the VA. In the alternative, the United States argues that the other act evidence is inextricably intertwined because the contact at issue references previous actions or conduct by Defendant.

Defendant's reply asserts that the government's response only clarifies the Defendant's contention that this is propensity, not other bad acts evidence. Defendant argues that the issue of intent only pertains to the instant conduct charged and that any "other acts" evidence bears in no way on Defendant's intent at the time of the alleged offense.

When evaluating admissibility under Rule 404(b), the Ninth Circuit has developed a four-part test to determine whether or not exclusion is proper. Evidence of a prior act may be admitted if "(1) the evidence tends to prove a material point; (2) the prior act is not too remote in time; (3) the evidence is sufficient to support a finding that the defendant committed the other act; and (4) the act is similar to the offense charged." *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013 (9th Cir. 1995) (quoting *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994). The rule is inapplicable, however, where the evidence the government seeks to introduce is directly related to, or inextricably intertwined with, the crime charged. *United States v. Lillard*, 354 F.3d 850, 854 (9th Cir. 2003); *Vizcarra-Martinez*, 66 F.3d at 1012-1013 (evidence is "inextricably intertwined" if it "constitutes a part of the transaction that serves as a basis for the criminal charge" or "was necessary

to . . . permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime"). If the Court finds the evidence passes the Rule 404(b) test, it may still be inadmissible if its probative value is substantially outweighed by the risk of unfair prejudice. See FED. R. EVID. 403; *United State v. Ramirez-Jiminez*, 967 F. 2d 1321, 1327 (9th Cir. 1992).

Since the charge requires proof of specific intent to "harass, intimidate, torment or embarrass," to establish knowledge, or lack of accident or mistake, the United States may introduce the facts of prior incidents of Defendant's telephonic contact with the *Veteran's Administration* that was *related to his medical care and of a harassing nature*. Admission of this other act evidence is admitted upon proper notice to the Defendant, with the proper evidentiary foundation. Whether Defendant was convicted of a crime in relation to such conduct is immaterial and inadmissible. Therefore, Defendant's motion, **ECF No. 51**, is **DENIED**.

D. Vouching and Improper Statements, Backdoor Character Evidence, and Hybrid Witnesses

In its motion *in limine* to prohibit "vouching," Defendant requests that the Court preclude the government from commenting on "overwhelming evidence," from using "we know" in closing, from suggesting that if Defendant is innocent than government witnesses must be lying, and, finally, from urging a conviction to protect the community.

In its motion *in limine* to prohibit backdoor character evidence, Defendant requests the Court to

direct the United States to instruct its witnesses to avoid inserting character evidence about Defendant in their responses.

In its motion *in limine* to prohibit the so-called "hybrid" witnesses, Defendant requests that officer testimony be limited to either expert testimony or lay opinion testimony, but not both. Defendant is concerned that if an officer is allowed to testify as an expert to the general nature of criminal activity and then also testify to his experience of the facts in issue, that this testimony would take out of the hands of the jury the role of piecing together and drawing its own conclusions about the evidence.

The United States responds to the above motions in a single pleading. As to the issue of vouching, the United States acknowledges its obligation to avoid vouching but suggests that the proper method for challenging this action is by objection at trial rather than in a pretrial motion. Regarding the issue of backdoor character evidence, the United States represents that to the extent that any evidence is excluded by this Court, that the government will seek to ensure compliance this Court's order. Finally, regarding the issue of hybrid witnesses, the United States represents that it does not intend to call any expert witnesses at trial.

Vouching, or bolstering, occurs when the government places the prestige of the office behind a witness through "personal assurance of the witness's veracity or [by] suggesting that information not presented to the jury supports the witness's testimony." *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005). Generally, testimony

regarding the credibility of a witness is prohibited unless it is otherwise admissible as character evidence. *United States v. Geston*, 299 F.3d 1130, 1136 (9th Cir. 2002).

Defendant's motions, **ECF No. 52, 53, 54**, are **DENIED with leave to renew**. Should specific evidence of this nature be offered and objected to at trial, the Court will rule based on the circumstances presented at that time.

THE GOVERNMENT'S MOTIONS IN LIMINE

A. Motion to Exclude Evidence

The United States requests that the Court exclude any evidence relating to Defendant's helicopter crash from nearly 30 years ago as well as his "Certificate of Release or Discharge from Active Duty" which contains a summary of Defendant's past military experience as well as a summary of conditions the Defendant suffered from in 1997. The United States argues that this evidence is not relevant to the case at bar and even if the Court found otherwise, that such evidence should be excluded under FED. R. EVID. 403 as unduly prejudicial (garnering sympathy).

Defendant responds that the cause of his medical conditions support the defense that he was calling the VA with a legitimate purpose of discussing his medical bills and medical care, not with the illegitimate purpose to harass. Defendant rejects the offer of a stipulation to his medical conditions and asserts his right to prove his own case.

Because this case largely involves Defendant's demands for care or payment from the VA, and

because no party disputes his legitimate medical condition and need for care, the evidence in question is irrelevant and likely to confuse the issues before the jury.

The United States' motion, **ECF No. 71**, is **GRANTED**. The photographs are inflammatory and duplicative of uncontested facts. There is no dispute as to Defendant's injuries, his medical needs, or the obligation of the Veteran's Administration to address those needs. The packet of photographs and newspaper clippings of the helicopter crash marked at ECF No. 77 will be excluded. Defendant remains free to assert his medical needs as they may bear upon the alleged conduct.

Additionally, Defendant's Motion to reconsider this issue, **ECF No. 79**, is **DENIED** for the same reasons set forth above.

Trial is scheduled to commence on **Monday, August 7, 2017 at 9:00 a.m.** in Spokane, Washington.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and furnish a copy to counsel.

DATED August 2, 2017.

/s/

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Case No. 2:16-PO-0198-JTR

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT MARK WAGGY,

Defendant.

SECOND AMENDED INFORMATION

The United States Attorney Charges:

COUNT ONE

On or about April 15, 2016, in the Eastern District of Washington, the Defendant, ROBERT MARK WAGGY, did make a telephone call with the intent to harass, intimidate, torment and embarrass any other person, to wit: M.D., an employee of the Mann-Grandstaff Veterans Administration Medical Center, located within lands reserved and acquired for the use of the United States and under the exclusive and concurrent jurisdiction thereof, to wit: property of the United States' Department of Veteran's Affairs, by threatening to inflict injury on M.D., in violation of 18 U.S.C. § 13, and Revised Code of Washington § 9.61.230(1)(c).

COUNT TWO

On or about April 19, 2016, in the Eastern District of Washington, the Defendant, ROBERT MARK WAGGY, did make a telephone call, to wit: the first completed call to S.P. on that date, with the intent to harass, intimidate, torment and embarrass any other person, to wit: S.P., an employee of the Mann-Grandstaff Veterans Administration Medical Center, located within lands reserved and acquired for the use of the United States and under the exclusive and concurrent jurisdiction thereof, to wit: property of the United States' Department of Veteran's Affairs, by using any lewd, lascivious, profane, indecent, and obscene words and language and by threatening to inflict injury on M.D., in violation of 18 U.S.C. § 13, and Revised Code of Washington § 9.61.230(1)(a), (c).

COUNT THREE

On or about April 19, 2016, in the Eastern District of Washington, the Defendant, ROBERT MARK WAGGY, did make a telephone call, to wit: the second completed call to S.P. on that date, with the intent to harass, intimidate, torment and embarrass any other person, to wit: S.P., an employee of the Mann-Grandstaff Veterans Administration Medical Center, located within lands reserved and acquired for the use of the United States and under the exclusive and concurrent jurisdiction thereof, to wit: property of the United States' Department of Veteran's Affairs, by using any lewd, lascivious, profane, indecent, and obscene words and language and by repeatedly calling S.P., in violation of 18 U.S.C. § 13, and Revised Code of Washington § 9.61.230(1)(a), (b).

COUNT FOUR

On or about April 19, 2016, in the Eastern District of Washington, the Defendant, ROBERT MARK WAGGY, did make a telephone call, to wit: the third completed call to S.P. on that date, with the intent to harass, intimidate, torment and embarrass any other person, to wit: S.P., an employee of the Mann-Grandstaff Veterans Administration Medical Center, located within lands reserved and acquired for the use of the United States and under the exclusive and concurrent jurisdiction thereof, to wit: property of the United States' Department of Veteran's Affairs, by using any lewd, lascivious, profane, indecent, and obscene words and language and by repeatedly calling S.P., in violation of 18 U.S.C. § 13, and Revised Code of Washington § 9.61.230(1)(a), (b).

COUNT FIVE

On or about April 19, 2016, in the Eastern District of Washington, the Defendant, ROBERT MARK WAGGY, did make telephone calls, to wit: four unanswered calls to S.P. following three completed calls to S.P. on that date (charged herein as Counts 2 through 4), with the intent to harass, intimidate, torment and embarrass any other person, to wit: S.P., an employee of the Mann-Grandstaff Veterans Administration Medical Center, located within lands reserved and acquired for the use of the United States and under the exclusive and concurrent jurisdiction thereof, to wit: property of the United States' Department of Veteran's Affairs, by repeatedly calling S.P., in violation of 18 U.S.C. § 13, and Revised Code of Washington § 9.61.230(1)(b).

COUNT SIX

On or about April 29, 2016, in the Eastern District of Washington, the Defendant, ROBERT MARK WAGGY, did make a telephone call with the intent to harass, intimidate, torment and embarrass any other person, to wit: M.D., an employee of the Mann-Grandstaff Veterans Administration Medical Center, located within lands reserved and acquired for the use of the United States and under the exclusive and concurrent jurisdiction thereof, to wit: property of the United States' Department of Veteran's Affairs, by threatening to inflict injury on M.D., in violation of 18 U.S.C. § 13, and Revised Code of Washington § 9.61.230(1)(c).

Dated: July 27, 2017.

JOSEPH H. HARRINGTON
Acting United States Attorney

/s/

Timothy J. Ohms
Assistant United States Attorney