

Case # 325458

**Statement of Additional Grounds
for Review**

**State of Washington
v.
Stephen Anthony Bailey**

COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON

FILED

JAN 15 2015

STATE OF WASHINGTON)

Respondent,)

v.)

Stephen Anthony Bailey
(your name))

Appellant.)

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 325458

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, STEPHEN BAILEY, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

The inexperienced Threat of a potential 3rd strike consequence severely prejudiced Mr. Bailey's trial. The possibility of a 3rd strike conviction, even on a lesser charge, repeatedly affected defense tactics and strategies. It is also expected that it also impacted possible negotiations or plea bargain resolutions, resulting in an unfair trial. (Defendant's sentencing memorandum p. 7-10)
Conviction of 1st assault & intimidating a witness should be overturned and new trial granted. Because the state tried Mr. Bailey as a persistent offender, however - The supreme court ruled Mr. Bailey's 1st strike could not count ~~thereby~~ thereby creating grounds of extreme prejudice ~~(Defendant's sentencing memorandum p. 26)~~ (p. 26)
re-sentencing hearing 6-13-14

~~Ground 2:~~ Ground 2:
ineffective assistance of counsel. Counsel failed to insist that the sentencing judge read the transcripts in order to familiarize himself with the facts of the case - to make an informed judgement...

If there are additional grounds, a brief summary is attached to this statement.

Date: 1-12-15
Form 23

Signature: Mr. S.A. B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY WA

STATE OF WASHINGTON,

Plaintiff,

vs.

STEPHEN BAILEY,

Defendant.

NO. 07-1-02207-0

DEFENDANT'S
SENTENCING
MEMORANDUM

Status of the Case

Stephen Bailey was convicted by a Yakima County jury of the crimes of First Degree Assault-Domestic Violence and Intimidating a Witness-Domestic Violence. He was sentenced by Judge Michael Schwab to life in prison without the possibility of parole as the judge had concluded that the First Degree Assault conviction constituted a third strike offense. In an unpublished opinion filed August 5th, 2010, the convictions were affirmed¹. However, on February 13th, 2013, Division III of the court of appeals ruled² that a prior Robbery plea from when Stephen was under 18 years of age should not have been counted as a prior strike level offense and the case has been remanded for re-sentencing. A sentencing hearing is scheduled for the afternoon of Friday June 13th, 2014. Currently one hour has been allotted.

¹ Attached as exhibit A

² Attached as exhibit B

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ORIGINAL

Facts^{3 4}

1 In the late evening hours of March 5th, 2007, the police arrived at the
2 apartment residence of Genevieve Oshiro on two separate occasions (pg. 1126). The
3 first police response was regarding a fight in front of Genevieve's apartment
4 complex (pg.1126). Stephen Bailey had been "jumped" by four or five people
5 associated with his girlfriend Rosalinda Botello before Stephen could escape into his
6 grandmother's, (Genevieve Oshiro), upstairs apartment unit (pg. 641). Among the
7 people involved in assaulting Stephen was a person nicknamed "Red," who was the
8 boyfriend of Rosalinda's sister. When the police arrived at the apartment Stephen
9 hid under a blanket and refused to cooperate with the officers. The officers soon left.
10 (pg. 1127). After the police left the apartment, Stephen Bailey began arguing and
11 fighting with his girlfriend Rosalinda Botello. Stephen's grandmother, Genevieve
12 Oshiro, then called the police back to the apartment to stop the fight (pg.1129).
13 Officers arrived quickly and found Rosalinda and Stephen on the floor in a back
14 bedroom. Rosalinda was struggling to escape from Stephen who was holding her
15 down and apparently choking her. Stephen was then tased by one officer as
16 Rosalinda was pulled free by another.

17 On March 8th, 2007, a single count of Second Degree Assault was filed (07-1-
18 00511-6) based on the bedroom incident. After a plea offer to 3rd Degree Assault
19 was declined, the State dismissed without prejudice on 5-10-07, due to an
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28 ³ The specific facts of the case remain disputed. While a jury convicted Stephen of First Degree
29 Assault-Domestic Violence and Intimidating a Witness it is unclear which testimony the jury
30 relied upon to reach that decision. Each witness related events differently. In its unpublished
31 opinion the court of appeals set out facts sufficient for conviction, but that was using a standard
32 that was taking all evidence in the light most favorable to the state. That would not be the
33 appropriate standard here. Instead, the court must assume sufficient facts to support a conviction
34 without necessarily adopting any specific version of events which may not have been accepted by
the jury.

⁴ A copy of the trial transcript is attached as exhibit C. Page citations are to transcript page
number, as set by the transcriptionist.

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1 uncooperative victim. Stephen was out of custody from May 10, 2007 until charges
2 were re-filed, this time as a First Degree Assault and Tampering with a Witness.

3 Those counts were tried to a jury, which convicted on both.

4 Each percipient witness- Rosalinda Botello, Officer Durbin, and Officer
5 Urlacher- described the assault differently. During her trial testimony, Rosalinda
6 Botello said that Stephen Bailey was only trying to calm her down when the police
7 arrived at the apartment the second time. She testified that they had been arguing.
8 She had been using meth. Rosalinda said that she wanted to be with her sister to go
9 use drugs that night and Stephen did not want that to happen (pg 639). She testified
10 at trial that Stephen did not hurt her in any way⁵.

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13 When the police responded the second time on March 5th, 2007, Rosalinda
14 gave a recorded statement to the police indicating that Stephen had her in a choke
15 hold (pg. 633). She indicated that Stephen was upset because of the fight with Red
16 and that he had slapped her across the face, but it wasn't something brutal (pg. 645-
17 646). Pictures taken at the time showed no injury to the lip area, although there was
18 some redness under Rosalinda's chin (pg. 749). During this recording Rosalinda
19 said that she felt threatened when Stephen took her to the back room and that she did
20 not know what he could have done (pgs. 647,653). Yet at no point in this recorded
21 conversation did Rosalinda say that Stephen was trying to kill her or cause her great
22 bodily harm (pg. 650-656 and 722-742).

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24 During the trial the state brought in two out of the three responding officers
25 from March 5th, 2007. First, officer Durbin testified that officers were able to
26 respond to the second call of March 5th, 2007, within a matter of seconds of getting
27 the call as they were still in the immediate vicinity (pg.810, 841). Durbin testified
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34 ⁵ At sentencing Rosalinda switched her testimony to state that Stephen had hit her and covered her
mouth, but that he was not choking her. (pg. 1554-1559).

1 that they were allowed into the open apartment door and that Stephen's grandmother
2 Genevieve Oshiro pointed the officers into a back room (pg 811). Officer Durbin
3 could hear some thumping noises as he approached the room (pg 812). Officer
4 Durbin testified that when he looked into the room he saw Stephen Bailey with
5 Rosalinda in front of himself and that Stephen's hands were around Rosalinda's
6 neck. According to Officer Durbin after about 3 seconds Stephen then rolled onto
7 his back with Rosalinda on top of him as the officers entered the room (pg 815,
8 856). According to Officer Durbin, Stephen Bailey appeared to be using Rosalinda
9 as a shield at this point, blocking the officers' ability to reach him (pg 821-822).
10 Within 5 seconds or less, however, officer Durbin was able to tase Stephen which
11 allowed officer Henne to get Rosalinda from the room (pg. 857). During his
12 encounter with the police Stephen suffered a head injury which required 5 staples to
13 his head (pg 861). Rosalinda did not require medical attention. A red mark on her
14 neck was photographed.

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19 Officer Ryan Urlacher testified that he followed officers Henne and Durbin
20 into the back area of the apartment (pg 887). Officer Urlacher testified that he was
21 allowed into the apartment by Genevieve Oshiro who was sitting on the sofa
22 smoking a cigarette (pg. 908). When Officer Urlacher entered the room Officer
23 Durbin already had a taser aimed at Stephen Bailey (pg. 888, 898). According to
24 Officer Urlacher, Stephen Bailey had his left hand covering Rosalinda's mouth and
25 nose and his right arm was wrapped around her neck (pg. 890). Both Stephen
26 Bailey and Rosalinda Botello were crying (pg. 925). Officer Urlacher testified that
27 Stephen was surrounding Rosalinda so that she could not resist⁶. Officer Urlacher
28 could not tell if Rosalinda Botello was able to breathe, but he was aware that she
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34 ⁶ Officer Durbin testified that Rosalinda was actively pulling at Stephen's arms during this
confrontation. (pg. 856)

1 was conscious (pgs. 925- 926)⁷. As soon as Officer Durbin deployed his taser,
2 Rosalinda was released (pg. 898). According to Officer Urlacher it took about 10⁸
3 seconds for Durbin to deploy his taser once he got into the room. Stephen Bailey
4 was then arrested and taken to the hospital (pg. 904). Officer Urlacher also testified
5 that Stephen Bailey appeared to be intoxicated by alcohol at the time of this incident
6 (pg. 900-904).
7

8 Dr. Selove testified that a restriction of blood flow can cause a loss of
9 consciousness in 5 to 15 seconds (pg. 988). Dr. Selove did not testify about how
10 much time of blood flow restriction after a loss of consciousness would have been
11 needed to cause death or great bodily harm⁹ (pgs. 967-1003). Dr. Selove testified
12 about the effects of manual strangulation when it restricts air flow and Dr. Selove
13 testified how petichial hemorrhaging would be expected (pg. 998) No petichial
14 hemorrhaging was noted in this case (pg. 998).
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17 During the trial the state brought in several witnesses to impeach Rosalinda's
18 testimony that she was never assaulted by Stephen Bailey, either in March or later in
19 June. Corrections officers Cary Steiner, Cathy Lacompte and Chris Perez testified
20 that there had been a subsequent report from Rosalinda regarding a fight in June,
21 (after the charges had been dismissed and prior to them being refilled), in which
22 Stephen allegedly hit her across the face before she jumped from a moving car (pg.
23 765, 772, 786). Yet, no injuries were noted by Cary Steiner, Cathy Lacompte or
24 Chris Perez at that time (pgs. 772 and 781). Cary Steiner testified that in June,
25 Rosalinda also talked about the March 5th fight at the apartment and that in June she
26 said that Stephen did have her in a choke hold when the police came into the
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32 ⁷ Officer Urlacher also testified that it appeared that Rosalinda could not breathe at this time (pg.
33 936).

34 ⁸ Durbin testified that it was at most 5 seconds. (pg. 857)

⁹ There is no evidence in this case that Rosalinda ever lost consciousness.

1 apartment (pg 768). This report to the corrections officers was made just after
2 Rosalinda had found Stephen in a motel room with another woman (pg. 771). At
3 trial Rosalinda said she was jealous when she made the reports in June to Stephen's
4 community corrections officers and that the reports in June were lies intended to get
5 Stephen arrested.
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7 Stephen Bailey did not testify during the trial.
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10 Considerations of Improper Bias

11 Despite pretrial rulings to the contrary the state was able at trial to portray
12 Stephen as a tattooed ex-con who berates and demeans women, especially his
13 girlfriend. Pretrial motions in limine were repeatedly violated by State witnesses,
14 including references to the defendant having been in prison and references to
15 restraining orders. Similarly, it became impossible to disguise Stephen's in custody
16 status as several of Stephen's recorded jail calls were played. Officer Urlacher's
17 misidentification of the defendant as a person with a teardrop tattoo was the most
18 flagrant violation from the defense perspective as it identified the defendant as
19 someone having previously committed an act of murder¹⁰ (See pg 905 and motion
20 for mistrial pgs 1167-1177)¹¹. The defense will never know how much these
21 violations of the court's pretrial rulings impacted the jury during their deliberations.
22 There is no way to find out how such transgressions overtly or subliminally affected
23 the outcome. It is not a question you can simply ask in order to find out. What is
24 crystal clear is that the trial court granted the defendant's motions in limine in an
25 effort to avoid unfair bias, and yet those forbidden subjects were still testified to in
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33 ¹⁰ The tattoo by Stephen's eye is actually the number 13.

34 ¹¹ The defense will never know if this flagrant violation of the court's pretrial ruling was intentional or just grossly
careless. The defense believes it was an intentional violation, but has no proof of this. Trooper Urlacher is currently
on the "Brady" list. It is not expected that he was in 2007, but "Brady" lists did not exist then.

1 front of the jury. It is impossible for the defense to believe that the improper taint
2 during trial did not influence the verdict. Judge Schwab acknowledged that the
3 amount of taint was unfortunate (pgs 1478-1463), but did not find it adequate to
4 order mistrial. The court of appeals did not find these considerations adequate to
5 overturn the verdict either.
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7 Because of the distinctly different function of this sentencing court, it is
8 hoped that at sentencing this court will factor in all of the improper influences which
9 permeated the trial and appropriately mitigate the sentence. While the sentence the
10 court imposes must be for the crimes of conviction, the sentence also should
11 recognize how far of a stretch it was for the jury to get there. The court is not in a
12 position to set aside or modify the verdict, but the court is in a position to partially
13 offset some of the damage that was done. Both Judge Schwab and the Court of
14 Appeals recognized taint resulting from violations of court orders by state witnesses.
15 The defense submits that the taint injected into this proceeding by state witnesses
16 amounts to a mitigating circumstance even if it was insufficient to merit a mistrial.
17 This alone is a substantial and compelling reason which would justify an exceptional
18 sentence below the guideline range.
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23 Additional Exceptional Sentence Considerations

24 There are no circumstances present which would justify an exceptional
25 sentence above the standard range. The jury was not provided with any special
26 interrogatories which would have been needed to support an exceptional sentence
27 above the standard range. It cannot be done in this case. An exceptional sentence
28 departure downward, however, is permissible in this case. The unique
29 circumstances of this case including the misperceived threat of a potential third
30 strike consequence are such a situation.
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1 The possibility of a third strike conviction, even on a lesser charge, repeatedly
2 affected defense tactics and strategies. It is to be expected that it also impacted
3 possible negotiations or plea bargain resolutions. In this unique case, the defense
4 had to assume that either a conviction for First Degree Assault or a conviction for
5 Second Degree Assault would result in a life-without-parole sentence for Stephen.
6 Therefore, throughout the trial and during closing arguments defense counsel had to
7 spend significant time and energy trying to avoid a potential jury compromise on a
8 lesser charge at the risk of increasing the possibility of an Assault First Degree
9 conviction. Because a Second Degree Assault charge would be as equally
10 devastating as a First Degree Assault charge, the defense was forced into an all or
11 nothing posture, including the comment to the jury in closing that there would be
12 "exactly the same extremely severe consequences if he was found guilty of Second
13 Degree Assault as he would for a First" (pg. 1398). Further, it was argued "you can't
14 compromise from First Degree Assault to Second Degree Assault and think justice
15 is being served in any fashion" (pg. 1398).

20 The state chose not to ask for a lesser included attempted First or Second
21 Degree Assault. Because of the expected third strike risk, the defense could not
22 either. Because of the mistaken belief that even a lesser Assault Second Degree
23 verdict would result in a third strike conviction, the defendant misunderstood his
24 options and his risks. The defendant's decision to testify, or not, was made based
25 upon incorrect information. The decision of whether to more aggressively impeach
26 Rosalinda Botello, or not, was made based upon incorrect information. And while it
27 may be only speculation of the defense, the prosecutor's decision to elevate this
28 event to a First Degree Assault despite the lack of injury to Ms. Botello appears to
29 have been motivated by an effort to strike Stephen out. Had the prosecutor known
30 that this would not be a third strike it seems plausible that some far lesser resolution
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1 would have still been available. This is reinforced by a look at the original charging
2 decision as a Second Degree Assault, before the case was dismissed in May of 2007.

3 Because the defense attempted to discourage both potential strike offenses as
4 well as chose not to ask for an Attempted First Degree Assault instruction it is
5 unfortunately possible that the jury's verdict was influenced by those decisions.
6 When coupled with the pretrial order violations described above it seems that the
7 result could have been different. Obviously, a jury is presumed to follow the law
8 and it is clear that the jury in this case convicted Stephen of a First Degree Assault
9 despite the absence of any meaningful injury to Rosalinda. Further, division III of
10 the court of appeals has already upheld the conviction of a First Degree Assault even
11 in the absence of any meaningful injury to Rosalinda. The defense cannot ignore
12 those results. Yet even with the verdict and the court of appeals ruling it remains
13 clear to the defense that this case should have been prosecuted as an Attempted
14 Assault instead of as a completed crime if any felony was to be pursued. Further it
15 remains difficult to comprehend how a jury and the court of appeals could assume
16 Stephen intended a result, (great bodily harm or death), that he never came close to
17 achieving.
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23 When considering the proper sentence to be imposed in this case the court
24 should recognize the numerous tactical disadvantages created by the mistaken belief
25 that a third strike sentence could result. The defense did not request lesser included
26 offenses of attempted assault. The defense strategy to so strongly discourage the
27 jury from considering the lesser included offense, (because of the assumption that
28 any of those would result in a life sentence), appears to have cost the defense
29 valuable credibility with the jury.
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32 Not only should a court start at the bottom of the guideline range, the court
33 should then consider a departure downward. There was a substantial prejudice to
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1 Stephen Bailey in the pressure placed on him to choose an all or nothing defense
2 strategy that eliminated lesser included offenses. This constriction of Stephen's
3 options in developing his defense because of a third strike later overturned by the
4 court of appeals presents a substantial and compelling reason justifying an
5 exceptional sentence below the guideline range. When a defendant is misinformed
6 of the risks associated with tactical decisions at trial the conviction is tainted and a
7 just sentence should seek to offset that harm.
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11 Consideration of Minimal Evidence of Intent
12 rising to the level of First Degree Assault

13 In Yakima County there are reports to the police of domestic assaults on a
14 daily basis. Additionally, it is commonly acknowledged that there are large
15 numbers of domestic assaults that are not reported to the police. Many of these
16 unreported assaults come to the attention of courts through the victim's efforts to
17 obtain a domestic violence protection order. It is impossible for the defense to
18 accurately quantify the numbers of these reports, but it is clear that the numbers are
19 large. In many of the reports of domestic violence there is an accusation of choking
20 or attempts to choke the reporting party. Thankfully, there are few cases in Yakima
21 where death or great bodily harm actually resulted. Out of the vast number of
22 incidents, both reported and unreported, only a very small percentage result in
23 serious injury. Few, if any result in felony criminal charges, and those that do are
24 not charged as first degree assaults unless severe injury is present as a
25 contemporaneous threat or a fact. Neither the court nor the jury control the charges
26 presented to them. Experience suggests to the defense that a more normal charge
27 would have been a completed misdemeanor assault or an attempted felony assault.
28 As discussed below, the legislature has, since this case was filed, amended the
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1 assault statutes to deal directly with strangulation, identifying it as Assault 2, rather
2 than Assault 1.

3 Yet somehow, in this case where Rosa never lost consciousness and suffered
4 no significant injury the jury not only decided that Stephen had that rare intent to
5 actually inflict such great bodily harm, the jury also somehow concluded that he had
6 actually already used enough force to accomplish that result. Examination of the
7 trial record shows testimony that varies from a covering of the mouth, to hands
8 around the neck, to one arm around the neck, coupled with Rosalinda Botello's
9 assertion that Stephen was trying to calm her down, rather than any assertion that he
10 was threatening or trying to kill or permanently injure her. With its two-count
11 Information the second time around, the state was able to bolster the minimal
12 evidence of intent to commit a First Degree Assault on the night of March 5, 2007,
13 with an extensive letter collection detailing the unhealthy nature of Stephen Bailey
14 and Rosalinda Botello's relationship, with repeated violations of pretrial orders, and
15 with testimony from an expert about how strangling would have looked had it
16 occurred. None of those things are relevant to Stephen Bailey's intent to inflict
17 great bodily harm. However, all of those factors combine to explain why the jury
18 made the jump from witnesses variously describing an attempt at some kind of
19 strangulation or restraint all the way to an intent to cause "a probability of death,
20 serious permanent disfigurement, or permanent loss or impairment of the function of
21 any bodily part or organ." RCW 9A.04.110.
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28 The defense recognizes that the verdict exists. The defense does not accept
29 the logic of it. The defense recognizes that the court of appeals let this verdict stand.
30 The defense cannot accept the logic of that either. Obviously, the sentencing court
31 must accept the result from the court of appeals and the court must sentence Stephen
32 for a First Degree Assault. Even so, a logical analysis makes clear that at most this
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1 should have been an attempted assault of some felony degree. For a jury to have
2 assumed the worst and for the court of appeals to accept that assumption is contrary
3 to the way the burden of proof is expected to work. In essence, the jury was
4 persuaded to take an incomplete assault describe inconsistently across three
5 percipient witness and assume that Stephen was among the tiny percentage of
6 people who intentionally use choking or strangulation to cause serious bodily harm.
7 From the defense perspective any sentence that is founded upon these assumptions
8 about intent and the completion of any degree of assault will inherently be unjust. A
9 sentence that is founded upon the jury's leap of logic that imposes anything more
10 than the low end of the standard range will be beyond excessive. At sentencing the
11 court has the opportunity to recognize that the evidence presented at trial is among
12 the thinnest of possible factual scenarios that could ever sustain a conviction. When
13 combined with the improper evidence presented at trial this then is an additional
14 substantial and compelling reason justifying an exceptional sentence below the
15 guideline range.
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21 Legislative Considerations

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23 Related to the above discussion of fairness and proportionality in sentencing
24 on the facts of this case, it is important to note that the legislature has now formally
25 recognized the serious risks associated with strangulation by adding strangulation to
26 the list of ways to commit a Second Degree Assault. This happened in 2007, and
27 became effective after the March event between Stephen and Rosa. When
28 recognizing all of the dangerous risks associated with choking, the legislature chose
29 to make the crime one of Second Degree Assault and not a First Degree Assault. See
30 RCWA 9A.36.021(g) and finding-2007 c79. The legislature chose a strike level
31 offense because strangulation can be so dangerous. But by making the crime a
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1 Second Degree Assault, the legislature must have also recognized that acts of
2 strangulation are not to be presumed as intended to kill or to cause great bodily
3 harm. As with the vast majority of strangulation cases, lesser consequences are
4 usually intended and achieved. It may seem counter-intuitive, but statistically, death
5 or great bodily harm is very highly unlikely to result even where strangulation is
6 proven. In cases where there is no loss of consciousness, no significant injury and
7 no overt threat to kill, it is obviously intended by the legislature that such acts
8 should now be prosecuted and punished as a Second Degree Assault. The
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10 significance of this 2007 change in legislation is that we now know - the appropriate
11 level of charging and of punishment in this case is clearly as a Second Degree
12 Assault as well. In enacting the additional provision of strangulation to the crime of
13 Assault in the Second Degree it was obviously not the legislature's intent to reduce
14 the severity of punishment as it had already existed. By the comments to the
15 amendment , it is crystal clear that it the addition of strangulation to the Second
16 Degree Assault statute was done to make a felony out of what often times may have
17 gone under prosecuted and under punished as a fourth degree assault. The acts that
18 were alleged in this case clearly fit within the scope of what was intended by the
19 legislature to be a Second Degree Assault. Despite the prosecutor's charging
20 decision and the jury's verdict, the court has discretion in sentencing because it is
21 sometimes necessary to depart downward in order to preserve fairness in this key
22 area of criminal justice. This court can do so by recognizing this substantial and
23 compelling reason justifying an exceptional sentence below the guideline range and
24 sentence Stephen as the legislature intended.
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Appropriateness of a Second Degree Assault Range Sentence

1 The idea that this case would have been properly prosecuted and possibly
2 convicted as a Second Degree Assault or as an Attempted Second Degree Assault is
3 evidenced by the legislative intent of the 2007 amendment. It was also repeatedly
4 suggested by Judge Schwab during the proceedings. For example, at the motion to
5 set aside the verdict Judge Schwab expressed the sentiment:
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8 “Mr. Klein now argues the evidence that was presented in court
9 no rational trier of fact could have accepted the State’s theory
10 on that evidence and convicted Stephen of these charges.

11 Once again, its, it seems to me that it’s for the jury to
12 decide their interpretation of the evidence. Now they may be
13 wrong. They, I may have reached a different decision if I was
14 on the jury. Any of us might, but that’s what their
15 responsibility is.”

16 At page 1468, Judge Schwab

17 At the sentencing hearing Judge Schwab again articulated not only his
18 sadness at having no choice in the possible sentence, but also suggested that
19 the charge of conviction was not one he favored.
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21 “So I, as I look at your record and as I look at these
22 cases that I have presided over here it’s just really sad. There’s
23 a, not a lot of choices I have here. I always wish I had, every
24 Judge wishes he had choices and not just being told this is
25 where you have to go with a case.

26 You have been found guilty of First Degree Assault-
27 Domestic Violence, Intimidating a Witness-Domestic Violence.
28 Regardless of my own, if I had sat on the jury, I felt there was
29 sufficient evidence from which a rational jury could have found
30 you guilty. That’s the standard I have to use.”

31 At pgs. 1591-1592, Judge Schwab
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1 The court has many substantial and compelling reasons to go below the
2 standard range, whatever the range is calculated to be. If it chooses to do so, the
3 range for a Second Degree Assault seems appropriate even in light of the conviction.
4 If the court feels obligated to remain within the guidelines, the low end is the only
5 proper sentence.
6

7 Defective Robbery Conviction

8 In February, 1998, Stephen Bailey entered an Alford plea in adult court to a
9 charge of Second Degree Robbery. 97-1-02170-0. However, Division III of the
10 court of appeals has concluded that the adult court did not properly obtain or retain
11 jurisdiction and the court has held that that offense cannot be used as a "strike"
12 against him. (See Exhibit B). Specifically, the court wrote "By failing to establish a
13 valid waiver of juvenile court jurisdiction, the State cannot use Mr. Bailey's 1998
14 conviction to sentence him as a persistent offender."¹² Because the court of appeals
15 has held that the robbery plea was improperly done in an adult court lacking proper
16 jurisdiction, it stands to reason that the plea was invalid. Because the plea was
17 invalid it stands to reason that it cannot be used for any purpose in calculating
18 Stephen Bailey's offender score. Because the plea was invalid it further stands to
19 reason that it cannot be used for any purpose in calculating Stephen Bailey's
20 sentence. The guideline calculations establish the standard range sentence for a
21 specific offense. Then the focus of the court in imposing a guideline sentence must
22 be based on the specific circumstances surrounding the acts charged. In this case
23 those acts consist primarily of an assault which was done without a weapon and
24 which left no injury other than some slight redness under Rosalinda Botello's chin
25 This is a case where the undisputed evidence shows that Rosalinda Botello's chin
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2 standard range, whatever the range is calculated to be. If it chooses to do so, the
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14 valid waiver of juvenile court jurisdiction, the State cannot use Mr. Bailey's 1998
15 conviction to sentence him as a persistent offender."¹² Because the court of appeals
16 has held that the robbery plea was improperly done in an adult court lacking proper
17 jurisdiction, it stands to reason that the plea was invalid. Because the plea was
18 invalid it stands to reason that it cannot be used for any purpose in calculating
19 Stephen Bailey's offender score. Because the plea was invalid it further stands to
20 reason that it cannot be used for any purpose in calculating Stephen Bailey's
21 sentence. The guideline calculations establish the standard range sentence for a
22 specific offense. Then the focus of the court in imposing a guideline sentence must
23 be based on the specific circumstances surrounding the acts charged. In this case
24 those acts consist primarily of an assault which was done without a weapon and
25 which left no injury other than some slight redness under Rosalinda Botello's chin.
26 This is a case where the undisputed evidence shows that Rosalinda never lost
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1 consciousness as she and Stephen were struggling on the floor. When imposing a
2 sentence in this case without significant injury the court must disregard the invalid
3 Second Degree Robbery adjudication/conviction both in establishing the correct
4 sentence range and also when imposing the sentence.
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7 Guideline Calculation

8 At the sentencing hearing in 2008, in addition to the Second Degree
9 Robbery charge in 97-1-02170-0, the state provided fingerprint evidence of
10 convictions against Stephen Bailey in cause numbers 02-1-02589-2 and 00-1-01595-
11 5. According to the prior hearing, Stephen Bailey was convicted of Third Degree
12 Rape in 02-1-02589-2. The trial record is unclear what the 00-1-01595-5, case was,
13 although at one point in the process, over objection, Stephen indicated that he had a
14 prior conviction for Taking a Motor Vehicle Without Permission. (pg. 1520). Other
15 than the prior Rape 3 and the defective Robbery 2, the state did not introduce
16 evidence supporting other convictions. Washout considerations are, likewise,
17 difficult at this point to determine. Whatever the range is calculated to be the
18 defense will be asking for an exceptional sentence downward. If the court feels
19 compelled to stay within the guideline range the defense urges the court to remain at
20 the bottom.
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27 Expected Position of the State

28 It is expected that the state will be seeking the maximum possible sentence in
29 this case. Despite the extremely short duration of possible strangulation and the lack
30 of any significant injury the defense expects the state to seek to incarcerate Stephen
31 for as long as possible. The defense expects the state to applaud the jury's ability to
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¹² At page 443

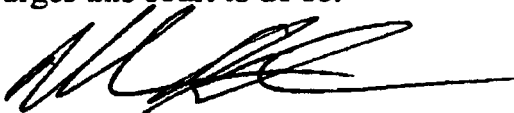
1 speculate on Stephen's ultimate intent and the defense expects the state to continue
2 that speculation forward. The defense expects the state to attack Stephen's with his
3 prior gang ties, criminal history and abusive nature in seeking to justify such an
4 extreme sentence. The defense expects this because it already worked for the State
5 at trial. Also, the State has already indicated on the record that their justification for
6 seeking a top of the range sentence will include the defendant's prior felony
7 criminal history. This position is inherently specious. While the defendant's prior
8 criminal history is appropriately used to establish a guideline range it is illogical to
9 assert that it should further be used to then move to the top of those same guidelines.
10 It should be self evident that the court must focus on the acts charged and convicted
11 in sentencing and not the crimes which created the range for consideration.
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15 The state is also expected to argue to the court the obvious severity of the
16 crime and the need for an extremely high sentence. But this will be the same
17 prosecutor who initially charged this out as Second Degree Assault and offered a
18 plea to a Third Degree Assault and a 38 month sentence (pg.1585). The acts alleged
19 never changed. The availability of the officer witnesses never changed. Rosalinda's
20 testimony in favor of Stephen about what happened never changed. The only
21 circumstance that changed was the State's ability to bring in 404(b) evidence and
22 impeachment evidence, none of which provided substantive evidence of guilt or
23 otherwise elevate the level or seriousness of the offense.
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28 Conclusion

29 Potential innocence is not among the list of non-exclusive factors that can
30 justify an exceptional sentence. It doesn't need to be. It is obvious that possible
31 factual innocence demands an exceptional downward departure. The defense cannot
32 hide its outrage at the behavior of state witnesses in flagrant violation of pretrial
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1 orders, nor should we. Nor can the defense hide its disappointment with a verdict
2 that, in light of the scant evidence as it came through in trial, appears tainted by
3 those violations. The defense cannot escape the reality that the mistaken belief in
4 the risk of a third strike forced Mr. Bailey into a high-risk, all-or-nothing tactic.
5 This mistaken belief also corrupted his decision whether to testify. The defense
6 cannot escape the reality that the mistaken belief in the risk of a third strike landed
7 Stephen with a First Degree Assault conviction for an event that should for
8 innumerable reasons have remained at most as a Second Degree Assault, as it was
9 originally charged. This court is not without discretion. It has been given discretion
10 under the federal and state constitutions, and by the legislature of this state,
11 specifically for situations such as Mr. Bailey's. The facts of this case and the course
12 of the trial on those facts cries out for this court to exercise its discretion in a
13 downward departure. Mr. Bailey respectfully urges this court to do so.
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